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Moral Character as a Professional Credential

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Moral Character as Professional Credential

Moral character as a professional credential has an extended historical lineage. For lawyers, the requirement dates to the Roman Theodesian Code, and its Anglo-American roots reach to thirteenth century England.¹ In this country, every state bar currently makes certification of character a prerequisite for practice, and most other nations and licensed professions impose a similar mandate.² Yet despite the pervasiveness of these requirements, their content and implementation have attracted remarkably little serious scholarly interest. There has been no comprehensive historical or empirical research on the American bar's character mandates, and no systematic scrutiny of their underlying premises. Except for a brief flutter of interest during the McCarthy and Watergate eras, certification has provoked little debate.

The following analysis seeks to reopen that dialogue. It begins with a brief historical overview of character mandates in both admission and disciplinary contexts. Drawing on a variety of secondary source materials as well as primary empirical research, subsequent discussion focuses on the more recent implementation of character requirements. Through interviews with bar examiners in all fifty states, surveys of reported cases and character application forms, and interviews with selected law school administrators, this study presents the first comprehensive profile of the certification process. In addition, analysis of disciplinary actions for misconduct occurring within and outside lawyer-client professional relationships offers some insight into prevailing double standards for aspiring and admitted attorneys.

After a brief description of the survey methodologies and current certification procedures, the study addresses structural and substantive problems in character assessment: the subjectivity of standards, the inadequacy of information and predictive techniques, and the costs of moral oversight in both economic and constitutional terms. A final section explores a variety of alternatives, ranging from abolition of bar character procedures to modifications of their scope and format.

By focusing in depth on the administration of bar character mandates, this study raises certain fundamental questions about the premises and practices of our licensing structures. Throughout its history, the moral fitness requirement has functioned primarily as a cultural showpiece. In that role, it has excommunicated a diverse and changing community, variously defined to include not only former felons, but women, minorities, adulterers, radicals, and bankrupts. Although the number of applicants

1. Tippen, *Introduction*, B. EXAMINER, Aug. 1982, at 6; Comment, *Good Moral Character and Admission to the Bar: A Constitutionally Invalid Standard?*, 48 U. CIN. L. REV. 876, 876 (1979).

2. THE BAR EXAMINERS' HANDBOOK (S. Duhl 2d ed. 1980) [hereinafter cited as BAR EXAMINERS' HANDBOOK].

formally denied admission has always been quite small, the number deterred, delayed, or harrassed has been more substantial. In the absence of meaningful standards or professional consensus, the filtering process has proved inconsistent, idiosyncratic, and needlessly intrusive. We have developed neither a coherent concept of professional character nor effective procedures to predict it. Rather, we have maintained a licensing ritual that too often has debased the ideals it seeks to sustain.

I. AN HISTORICAL OVERVIEW OF CHARACTER REQUIREMENTS

A. *The Origins of a Professional Culture: English Antecedents*

Although formal character requirements for practicing attorneys span almost two millenia, little is known about their content or effect prior to the last century. What scant historical material is available suggests that such formal mandates have had little practical significance. Certainly the English traditions from which the American bar drew gave no priority to systematic character certification.

By the eighteenth century, the British legal profession had a bifurcated structure. The upper branch was composed largely of barristers, whose practice consisted of in-court representation, and who were regulated by autonomous Inns of Court.³ The lower branch, consisting of solicitors, was governed by professional associations and rules of court, supplemented by statutory enactments.

Among barristers, fitness for practice was largely a matter of wealth and social standing. A career in the upper branch began with attendance at one of four Inns of Court, typically followed by a clerkship with a practicing barrister.⁴ During the eighteenth century, some Inns waived certification requirements for sons of powerful members, or for those with letters of recommendation from judges.⁵ For a substantial period, barristers also effectively excluded from Inn membership certain presumptively unfit groups, including Catholics, tradesmen, journalists, and solicitors.⁶ Income was an equally significant filtering device. The expense of legal education and establishing a practice at the Inns of Court largely restricted access to those from families of considerable means.⁷

3. Although the upper branch technically consisted of 11 distinct classes, including various royal appointments, barristers were the most numerous members. See 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 3-101 (1938).

4. W. READER, PROFESSIONAL MEN: THE RISE OF THE PROFESSIONAL CLASSES IN NINETEENTH-CENTURY ENGLAND 121 (1966).

5. 12 W. HOLDSWORTH, *supra* note 3, at 22-23.

6. *Id.* at 19; M. BIRKS, GENTLEMEN OF THE LAW 133 (1960).

7. H. COHEN, A HISTORY OF THE ENGLISH BAR AND *Attornatus* to 1450, at 500-501 (1929) (only wealthy became barristers in 15th century); 6 W. HOLDSWORTH, *supra* note 3, at 436 (1924) (only wealthy became barristers in 17th century); R. POUND, THE LAWYER FROM ANTIQUITY TO

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Apart from these caste-bound restraints, the profession's upper branch made little systematic effort to probe the personal attributes of its members. In the early nineteenth century, the Inns began requiring applicants to obtain references from two barristers prior to admission, but there is no evidence that this mandate functioned other than to solidify the class bias of the admissions structure.⁸ Nor does it appear that barristers during this period were much interested in formally disciplining moral lapses, except where they affected the internal atmosphere of the Inns. Unbecoming behavior could trigger expulsion, but publicly sanctioned offenses typically involved breaches of etiquette rather than serious ethical lapses.⁹

Of course, the absence of recorded disciplinary cases or formal character screening cannot be taken to imply an absence of moral oversight. The Inns constituted a small, homogeneous community, in which deviant behavior was unlikely to escape notice. The requirement that students eat a prescribed number of dinners at their Inn permitted some professional socialization, as well as *de facto* screening of potential clerks. And in many instances, collegial opprobrium undoubtedly proved as effective a disciplinary mechanism as formal sanctions. What remains less clear is the extent to which character mandates had content apart from etiquette and social status.

Membership in the lower branch of the profession was governed less by class and more by formal regulation. During the early eighteenth century, the abysmal level of practice among solicitors prompted Parliament to pass a comprehensive statute requiring, *inter alia*, five years of apprenticeship and judicial examination of fitness and capacity for practice.¹⁰ Whether framers of the Act intended an explicit inquiry into moral character is uncertain, but it does not appear that searching scrutiny took place. At best, judges attempted to determine whether the candidate had served his apprenticeship and obtained the necessary affidavits.¹¹ Discipline for immoral conduct was equally lax. Disbarment rarely occurred even for the most egregious offenses, and the profession enjoyed little public respect.¹²

MODERN TIMES 100 (1953); W. READER, *supra* note 4, at 120 (mid 19th-century estimate of minimum cost of becoming barrister approximately 1000 pounds). Similar barriers may have confronted the aspiring Scottish attorney, for whom dancing and fencing lessons were "absolutely necessary." A. Patterson, *The Legal Profession in Scotland* 5 (1984) (unpublished manuscript on file with author).

8. 12 W. HOLDSWORTH, *supra* note 3, at 26.

9. *Id.* at 21, 27–28. Punishable offenses included discharging firearms, setting bonfires, or bringing dogs inside the Inns.

10. See 12 W. HOLDSWORTH, *supra* note 3, at 54; W. READER, *supra* note 4, at 28–29. Prior to the passage of that legislation, "[a]nyone could call himself a solicitor, and of those who did the vast majority . . . [had] no legal knowledge and little regard for their clients' interests." M. BIRKS, *supra* note 6, at 105.

11. 12 W. HOLDSWORTH, *supra* note 3, at 61–62.

12. M. BIRKS, *supra* note 6, at 109.

In response to this regulatory vacuum, a Society of Gentlemen Practisers was organized during the early part of the eighteenth century to upgrade the standards and standing of solicitors.¹³ But during the formative stages of the American bar, the regulatory structures of the British bar had given little meaning to the concept of character as a professional credential.

B. *The Evolution of Character Standards*

Within the American bar, moral character requirements have been a fixed star in an otherwise unsettled regulatory universe. Educational standards came and went, but, at least after the colonial period, virtue remained a constant prerequisite, in form if not in fact.

Jurisdiction over bar admissions and discipline traditionally has reflected a compromise between various interested constituencies. The courts, while asserting inherent power to determine standards for individuals practicing before them, have generally accepted legislative specifications of minimum requirements.¹⁴ The legislatures, in turn, have tolerated a large degree of professional autonomy over membership determinations in both admissions and disciplinary contexts. Over the last two centuries, the administration of character requirements has been delegated increasingly to the organized bar, subject to varying degrees of judicial oversight.

The morality of attorneys has been of public concern since the mid-seventeenth century. A number of colonies attempted to ban the profession entirely, and in the post-Revolutionary period, animus against lawyers' "blood-suck[ing]" practices frequently ran high.¹⁵ Against this backdrop, it is scarcely surprising that legislatures sought to impose character requirements for admission to the bar. For example, during the eighteenth century, Massachusetts demanded references from three ministers; Virginia mandated certification from a local judge; and New York and South Carolina provided for examination by the court to determine whether the

13. *Id.* at 144-53; 12 W. HOLDSWORTH, *supra* note 3, at 63-74.

14. See J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 279 (1950); *Is Admission to the Bar a Judicial or a Legislative Function?*, 1 B. EXAMINER 222 (1932), and cases cited therein. Most decisions accepted a legislative mandate as an "act of grace" on "principles of comity." *Id.* at 226 (citing *In re Cate*, 270 P. 968 (Cal. App. 1928)). Some decisions reasoned that specifications of minimum requisites operated as a limitation "not on the courts but on individual citizens." *Id.* at 224 (citing *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926) (emphasis in original)).

15. 2 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 17 (1965) (quoting 1 J. MCMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES: FROM THE REVOLUTION TO THE CIVIL WAR* 302 (1927)); see also L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 83 (1973) (lawyers as "'cursed hungry caterpillars' whose fees 'will eat out the very Bowels of our Commonwealth'") (quoting H. LEFLER, *NORTH CAROLINA HISTORY AS TOLD BY CONTEMPORARIES* 87 (1956)).

candidate was "virtuous and of good fame" or manifested "probity, honesty and good demeanor."¹⁶

Similar standards remained in place for the next two centuries.¹⁷ Even during the Jacksonian period, when most states deleted or severely diluted all educational prerequisites for the practicing bar, moral character mandates were retained.¹⁸ Prior to the twentieth century, however, it does not appear that these statutory prescriptions had significant force. Although a few states categorically excluded individuals convicted of certain crimes,¹⁹ the mobility of applicants and the absence of centralized records made such strictures difficult to enforce. Moreover, most jurisdictions vested discretion to assess character in the courts, which often subsequently delegated their screening functions to the local bar. Neither constituency appears to have been particularly interested in the enterprise. Reported cases reveal almost no instances of denial of admission on character-related grounds, and the anecdotal evidence available suggests that few candidates were foreclosed from practice for character deficiencies.²⁰

The only substantial group effectively excluded on grounds of character seems to have been women. To nineteenth century jurists, the "natural and proper timidity and delicacy which belongs to the female sex" disabled it from legal practice; the "peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, [were] surely not qualifications for forensic strife."²¹

Apart from this categorical exclusion, the character mandate had little practical import. Affidavits from personal references generally satisfied

16. G. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840*, at 10 (1979); W. BRYSON, *LEGAL EDUCATION IN VIRGINIA: 1779-1799, A BIOGRAPHICAL APPROACH* 11 (1982); 2 A. CHROUST, *supra* note 15, at 247-48, 267-68. By the late 18th century, the ministers dropped out of the Massachusetts process and applicants were subject to a statutory requirement that they be of "good moral character." Blackard, *Requirements for Admission to the Bar in Revolutionary America*, 15 TENN. L. REV. 116, 118 (1938).

17. For discussion of the relevant statutes, see 2 A. CHROUST, *supra* note 15, at 224-80.

18. For discussion of the Jacksonian democratization, see G. GAWALT, *supra* note 16, at 140-45; J. HURST, *supra* note 14. Representative statutory provisions appear *id.* at 250, 280.

19. See, e.g., 2 A. CHROUST, *supra* note 15, at 261 (Virginia statute barring admission of those convicted of treason, felonies, forgery, or willful and corrupt perjury).

20. One Illinois practitioner's examination for admission consisted of answering questions about his age, residency, one or two fundamental points of law, and the correct spelling of his name. Smith, *Abraham Lincoln as a Bar Examiner*, B. EXAMINER, Aug. 1982, at 35, 37. In Kentucky, a candidate unable to supply any correct answers to comparable legal questions was nonetheless admitted on the theory that "no one would employ him anyhow." 2 A. CHROUST, *supra* note 15, at 38 (quoting Smith, *Admission to the Bar in New York*, 16 YALE L.J. 514, 518 (1907)); see also J. HURST, *supra* note 14, at 281 (candidate with little legal education admitted because judge/examiner knew him "personally and very well").

21. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring); *In re Goodell*, 39 Wis. 232, 245 (1875).

admission requirements, and such documents were easily obtained.²² The bar evidenced no greater enthusiasm for policing the mores of practicing colleagues. Only the most egregious conduct, such as leading a lynch mob's courthouse assault, would typically trigger disbarment.²³

As was true for England, however, the apparent inadequacy of formal oversight should not obscure the role of other filtering devices. For example, in many Southern colonies, the common mode of preparation for practice was attendance at the British Inns of Court,²⁴ an option not readily available to those from lower socioeconomic brackets. More significantly, the apprenticeship system, which was the primary means of training for the bar prior to the twentieth century, also performed significant screening functions. Undoubtedly, most attorneys made some inquiry into an applicant's background and reputation before permitting him access to their affairs. If, during the course of training, the apprentice displayed moral lapses, his master generally was in a position to terminate employment and block admission at least to the local bar.²⁵ Finally, and most important, the context of most eighteenth- and nineteenth-century practice made reliance on formal disciplinary and admissions measures an uncertain, and to some extent unnecessary, approach. Lawyers generally functioned within small professional communities where reputation was a matter of common knowledge and informal exclusionary devices were often effective. Those with an unhappy history in one jurisdiction might find it expedient to migrate elsewhere. By the same token, the mobility of practitioners and absence of centralized regulatory structures made oversight by local jurisdictions of limited practical use.²⁶ As the profession grew in size and diversity, the perceived inadequacy of formal character screening became a serious professional issue.

C. *The Formalization of Character Screening*

The late nineteenth and early twentieth centuries witnessed a marked increase in interest in character certification. That interest was by no

22. See Lightner, *A More Complete Inquiry into the Moral Character of Applicants for Admission to the Bar*, 38 REP. A.B.A. 775, 781-82 (1913) (affidavits most common mechanism for testing character); Committee on Legal Education of the Massachusetts Bar Association, *Training for the Bar with Special Reference to the Admission Requirements in Massachusetts*, MASS. L.Q., Nov. 1929, at 18-19 (affidavit system inadequate) [hereinafter cited as *Mass. Comm. Rep.*].

23. Although the lynch mob leader was disbarred from practice in federal courts, the local community took a somewhat different view. He was never disbarred by the state courts and was subsequently elected to the local bench. See *Ex Parte Wall*, 107 U.S. 265 (1883), discussed in H. DRINKER, *LEGAL ETHICS* 44-45 & n.19 (1953).

24. L. FRIEDMAN, *supra* note 15, at 84. In Maryland and South Carolina during the early 18th century, preparation at the Inns was a prerequisite to admission. M. BIRKS, *supra* note 6, at 257.

25. See G. GAWALT, *supra* note 16, at 134.

26. See J. HURST, *supra* note 14, at 280 ("decentralization promoted laxity because it diffused responsibility").

means unique to the bar. During the same period, other professional groups also began tightening entry standards,²⁷ and occupational licensing, often accompanied by character requirements, first achieved a firm foothold.²⁸ Over the next half century, those subjected to moral mandates included barbers, beauticians, embalmers, engineers, veterinarians, optometrists, geologists, shorthand reporters, commercial photographers, boxers, piano tuners, trainers of guide dogs for the blind, and—ironically enough—vendors of erotica.²⁹

Within the legal profession, certification standards gradually stiffened. Between 1880 and 1920, states adopted additional entry procedures, such as publication of applicants' names, probationary admissions, recommendations by the local bar, court-directed inquiries, and investigation by character committees.³⁰ By 1917, three-quarters of the states had centralized certification authority in boards of bar examiners.³¹ A decade later, close to two-thirds of all jurisdictions had made further efforts to strengthen character inquiries through mandatory interviews, character questionnaires, committee oversight, or related measures.³² These certification requirements continued to stiffen through the 1930's, largely in response to efforts by the newly formed National Conference of Bar Examiners, and various bar associations.³³

The degree of character oversight varied considerably over time and jurisdictions, but certain common concerns were apparent. Much of the initial impetus for more stringent character scrutiny arose in response to an influx of Eastern European immigrants, which threatened the profession's public standing. Nativist and ethnic prejudices during the 1920's, coupled

27. C. GILB, *HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT* 61–64 (1966).

28. See Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CALIF. L. REV. 487 (1965).

29. Statutes typically required good moral character or provided for denial or revocation of licenses based on crimes of moral turpitude. Some vocations also required an oath of allegiance. See *Genusa v. City of Peoria*, 475 F. Supp. 1199, 1207, 1209–21 (C.D. Ill. 1979) (vendors of erotica), *aff'd in part and rev'd in part*, 619 F.2d 1203 (7th Cir. 1980); *Ali v. Division of State Athletic Comm.*, 316 F. Supp. 1246 (S.D.N.Y. 1970) (boxers); *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 227–228, 461 P.2d 375, 385, 82 Cal. Rptr. 175, 185 (1969) (citing statutes governing various professions); *Tanner v. De Sapio*, 2 Misc. 2d 130, 133, 150 N.Y.S.2d 640, 644 (Sup. Ct. 1956) (beauticians); *Guariglia v. North Dakota State Bd. of Architecture*, 268 N.W.2d 478, 480 (N.D. 1978) (architects); W. GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* 129–30 (1956); Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 10–19, 25–27 (1976). The scant evidence available does not reveal rigorous enforcement of such requirements. As the preceding sources reflect, reported license denials were intermittent and idiosyncratic. Vocational boards requiring personal references often simply collected rather than evaluated the requisite forms. See W. MOORE, *THE PROFESSIONS: ROLES AND RULES* 125 (1970).

30. Lightner, *supra* note 22, at 781–82.

31. R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S*, at 105 n.23 (1983); C. GILB, *supra* note 27, at 63.

32. See *Mass. Comm. Rep.*, *supra* note 22, at 44–78 (summarizing state procedures).

33. See Collins, *Foreword*, 1 B. EXAMINER 1 (1931); R. STEVENS, *supra* note 31, at 99–100.

with economic pressures during the Depression, fueled a renewed drive for entry barriers.

At the close of the nineteenth century, the recently-founded American Bar Association, joined by various state and local organizations as well as law schools, began spearheading a campaign for higher professional standards. While the quest was "aimed in principle against incompetence, crass commercialism, and unethical behavior," the ostensibly "ill-prepared" and "morally weak" candidates were often in fact "of foreign parentage, and, most pointedly, Jews."³⁴ Although most of the profession's efforts focused on strengthening educational requirements and ethical codes rather than on screening for character, the enterprises were by no means unrelated. Proposals mandating a prescribed number of years of college and law school education would impede access for those lacking personal resolve and private means.³⁵ In particular, such minimum requirements, coupled with stiffer entry examinations and ethical canons, could help stem the flood of those whose "eager quest for lucre" or inadequate command of the "King's English" had allegedly debased the profession in the eyes of the public.³⁶ It was also assumed that "thoro [sic] educational training" for applicants would "stiffen their moral backbone and enlarge their range of information to prevent their going astray."³⁷

Not all segments of the profession, however, were convinced that educational and ethical standards would prove adequate prophylactic measures; some bar members recommended rigorous character investigation to eliminate those lacking "proper antecedents, home environment, education, and social contacts."³⁸ Of course, as other bar spokesmen took pains to emphasize, those attributes were not always related. At the first National Bar Examiners Conference in 1933, the former Chairman of the ABA's section on Legal Education and Admission acknowledged that "[s]ometimes you have wonderful character evidence displayed even though the appli-

34. M. LARSON, *THE RISE OF PROFESSIONALISM* 173 (1977).

35. In 1920, the ABA approved recommendations by the Root Committee mandating two years of college and three years of full time legal study. J. AUERBACH, *UNEQUAL JUSTICE* 112-14 (1976). Such proposals generated vigorous opposition, *see id.*; R. STEVENS, *supra* note 31, at 115, 125 n.18, and states were slow to implement requirements regarding undergraduate training and attendance at an approved law school.

36. *Report of the Committee on Code of Professional Ethics*, 29 REP. A.B.A. 600, 601 (1906); J. AUERBACH, *supra* note 35, at 49, 315 n.18 (quoting Isidor J. Kresel, Chief Counsel, New York State Bar Ass'n). Of course, antisemitism in the legal profession was common before this period. In 1874, George Strong advocated "either a college diploma or an examination including Latin" as requirements for admission to Columbia Law School, on the ground that this would "keep out the little scrubs [German Jews mostly] whom the school now promotes from the grocery-counters . . . to be 'gentlemen of the Bar.'" Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, in 2 *WOMEN AND THE LAW* 231, 252 (D. Weisberg ed. 1982).

37. Vald, *Improving North Dakota Bar Admission Requirements*, 13 N.D.Q. 69 (1923).

38. *See* J. AUERBACH, *supra* note 35, at 49 (summarizing statements of Isidor J. Kresel).

cant is not well educated or his parents were born in Russia.”³⁹ The negative pregnant remains instructive, and there is little doubt that some efforts to stiffen character screening were colored by class and ethnic bias.

The clearest illustration of such sentiments was Pennsylvania’s implementation of a registration and preceptorship system in 1928. Under this system, prospective candidates faced a character investigation both at the beginning of law school and at the time of applying for admission to the state bar. In addition, applicants were required to find a preceptor with five years experience as a lawyer to monitor their conduct through law school and a six-month clerkship.⁴⁰ The initial character interview afforded an opportunity to dissuade the “unworthy” from pursuing a legal career, an enterprise in which Jewish lawyers particularly were urged to join.⁴¹

The definition of “unworthy” was quite elastic. Those rejected by one county board in 1929 included individuals deemed “dull,” “colorless,” “subnormal,” “unprepossessing,” “shifty,” “smooth,” “keen,” “shrewd,” “arrogant,” “conceited,” “surly,” and “slovenly.”⁴² A substantial number of candidates reportedly lacked a “proper sense of right and wrong”; others had no “moral or intellectual stamina,” appreciation of “social duty,” or “well-defined ideas on religion,” or were “[n]ot seeking admission for [the] best motives.”⁴³ Among those denied admission were applicants who saw “no wrong” in advertising, and one who sought “fame as [a] woman attorney and . . . public offic[ial].”⁴⁴ Other individuals were tainted by association; their sponsors were “unreliable,” or their family members had “unsavory” backgrounds or “poor business reputation[s].”⁴⁵ Insofar as the system was designed to filter out the most lumpen of the proletariat, it had modest success. During the first eight years of the Philadelphia program, about 7% of all candidates withdrew or were rejected, and some additional number were undoubtedly discouraged from applying.⁴⁶ The proportion of Jews admitted dropped sixteen percent, and almost no blacks gained entry.⁴⁷

39. *Character Examination of Candidates*, 1 B. EXAMINER 63, 72 (1932) (quoting George H. Smith) [hereinafter cited as *Character Exam.*].

40. See E. BROWN, *LAWYERS AND THE PROMOTION OF JUSTICE* 125–26 (1938).

41. *Character Exam.*, *supra* note 39, at 68.

42. Douglas, *The Pennsylvania System Governing Admission to the Bar*, 54 REP. A.B.A. 701, 703–05 (1929).

43. *Id.*

44. *Id.* The rejection of the woman attorney was reversed by the State Board.

45. *Id.*

46. E. BROWN, *supra* note 40, at 126.

47. J. AUERBACH, *supra* note 35, at 127–28.

The extent to which comparable biases colored other states' character decisions remains unclear. Although widely praised by the profession's elite, the Pennsylvania preceptor system found less favor in legislative and judicial circles.⁴⁸ Many jurisdictions did, however, experiment with law student registration systems, following ABA endorsement of the proposal in 1938.⁴⁹ And the scant evidence available suggests that the profession's concern with competition during the Depression had some effect on the attitudes of local certification committees. As examiners frequently argued, "with an overcrowded bar [and] an abundance of candidates who have unquestioned character," any doubts should be resolved against admission.⁵⁰ Among those raising doubts were non-conformists of various hues: radicals, religious fanatics, divorcees, fornicators, and any individual who challenged the profession's anticompetitive ethical canons.⁵¹

As subsequent discussion will reflect, character certification after the 1930's grew more rigorous in form, though not necessarily in effect. In most states, review became increasingly systematic, and definitions of virtue shifted with the national mood, but the number of individuals formally denied admission remained minimal.⁵² Of course, such statistics by no means capture the full instrumental or symbolic consequences of certification; rather, as later discussion will suggest, the system's greatest significance may lie in its deterrent and legitimating dimensions.

Bar disciplinary processes evolved in similar fashion, although policing practitioners has traditionally met with less enthusiasm than restricting entry. For most of this century, grievance committees typically exercised "sporadic and haphazard" control.⁵³ Although the growth of integrated bar associations during the mid-twentieth century gradually expanded the profession's housekeeping authority, gross inadequacies in the structure, resources, and jurisdiction of oversight agencies remained.⁵⁴ Moreover,

48. See, e.g., Appel, *The Pennsylvania System*, 3 B. EXAMINER 10 (1933); *Mass. Comm. Rep.*, *supra* note 22; *The Problem of Character Examination*, 3 B. EXAMINER 59 (1934). Only Delaware now imposes a preceptor requirement. See RULES OF THE BOARD OF BAR EXAMINERS OF THE STATE OF DELAWARE Rule BR-52.7-52.9.

49. See *infra* pp. 519-29.

50. *An Answer to the Problem of the Bootlegger's Son*, 1 B. EXAMINER 109, 110 (1932) (recommending denying admission to applicant whose family ran a still); see also *A Standard for Character Committee*, 1 B. EXAMINER 311 (1932) (because of "abundance of attorneys already admitted, and many excellent candidates," recommending denying admission to individual guilty of embezzlement 10 years earlier who had no subsequent offenses).

51. See Douglas, *supra* note 42, at 703-04 (rejecting those guilty of fornication, of associating with firms as a runner, and of disagreeing with bar policies on advertising and ambulance chasing); *Character Exam.*, *supra* note 39, at 65 (facts developed in divorce proceeding "might" bar admission). For discussion of admission cases involving political association and belief during 1920 to 1970, see *infra* pp. 566-70.

52. See *infra* note 116.

53. J. HURST, *supra* note 14, at 365-66.

54. For a discussion of bar oversight prior to the 1970's, see Steele, *Cleaning Up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413 (1978). For

bar discipline often reflected the same sorts of biases that characterized certification efforts. Interest centered on promotional activities among the lower echelons of the bar, and social deviance at its fringes.⁵⁵ Except in the most egregious cases, client grievances and abuses by prominent practitioners ranked lower on the professional agenda. Excommunications remained rare, and heretics formed a motley collection of convicted felons, suspected subversives, indiscrete adulterers, and champertous entrepreneurs.⁵⁶

The following discussion examines the structures, standards, and justifications under which such character oversight has proceeded. A recurring question is whether the increasing formalization of bar inquiry represents a significant advance in professional regulation.

II. THE STRUCTURE OF THE CERTIFICATION PROCESS

A. *The Survey Methodology*

To obtain information concerning the moral character screening process, I compiled data from bar examining authorities, reported judicial cases, and accredited law schools. The inquiry focused primarily on new applicants to the bar.⁵⁷ For comparative purposes, however, some information was collected from reported admission and disciplinary decisions involving attorneys guilty of misconduct in both professional and nonprofessional capacities.

Assembling a comprehensive account of bar activity required several stages of investigation. With the assistance of student research assistants, I compiled data in 1982 and 1983 from bar applications and from interviews with bar examiners in all fifty states and the District of Columbia.⁵⁸

more recent indictments, see *infra* notes 250-55 and accompanying text.

55. For example, of some 150 opinions by the ABA Committee on Professional Ethics and Grievances between 1924 and 1936, almost half (46%) dealt with advertising, solicitation, lay competition, and fees. The vast bulk of the remainder dealt primarily with conflicts of interest and conduct in litigation. See J. HURST, *supra* note 14, at 331. Other surveys of state and local bar associations revealed comparable priorities. See *id.* at 331-32 (New York); Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 245, 255-56 (1968). For discussion of early 20th-century cases involving discipline for sexual and political conduct, see *infra* pp. 551-55.

56. See H. DRINKER, *supra* note 23; Shuchman, *supra* note 55; *infra* pp. 552-55.

57. The petitions of attorneys seeking readmission or admission in a new jurisdiction raised issues regarding previous professional misconduct that were distinct from the considerations present for new applicants or for practitioners disciplined for activity arising outside the lawyer-client relationship.

58. Bar applications were collected between Fall 1982 and Spring 1983. Kansas, which had just completed a revision process, provided its 1984 application. Bar application data are compiled in Appendix I.

All bar examiners were contacted by phone. Except in the few cases in which respondents requested written questionnaires, the interview was completed orally. In all but four jurisdictions, central administrative officials provided the requested data by phone or mail. Lack of centralized information in Illinois, Missouri, New York, and Virginia made it necessary to seek assistance from local

In particular, I sought information concerning the questions put to all candidates, the type and volume of cases triggering non-routine inquiry, and the form that such additional investigation would take. In order to obtain more detailed information about the review process, I also sought data from bar administrators or committee chairmen involved in the highest level of review in fourteen representative states. These states were chosen to provide reasonable representation from the nation as a whole, after controlling for population, industrialization, urbanization, per capita income, racial composition, and a number of other variables.⁵⁹ No jurisdiction refused to respond, although some individuals, largely because of concern for confidentiality or lack of information, could not provide all the data requested.

To complete the survey of bar certification processes, I also surveyed all reported judicial opinions over the last 50 years (1932-82) concerning denials of admission on grounds of moral character, some 100 cases. To obtain a sense of what character attributes have been thought disabling for practitioners as well as new entrants, I then reviewed a selected sample of disbarments for nonprofessional misconduct, i.e., misconduct occurring outside a lawyer-client relationship.⁶⁰

It became apparent during the course of the study that bar examiners rarely exclude candidates on grounds of character, and generally report encountering few cases of serious misconduct. That raised a question as to whether law schools were performing a preliminary screening function. Accordingly, I first surveyed admission forms for all 169 accredited law schools to determine what personal information they routinely requested.

committee chairmen. In Virginia and Missouri, with 31 and 43 local committees respectively, interviewers contacted representatives of sample districts: the two largest urban areas and two randomly selected rural districts. In Illinois, data were collected from Chicago, which processes 85% of the state's applications, and from a less metropolitan area, the district that includes Peoria. Since New York has only nine character committees, each of which handles a substantial volume of applicants, the chairman of each committee was interviewed. A variant of the basic questionnaire was used for those jurisdictions. A representative interview questionnaire appears in Appendix II.

As in any empirical survey relying in part on individual recollections, the findings will not yield precision. Since not all respondents were able to answer every question, changes in the sample base are noted in parentheses following percentage calculations.

59. I initially contacted representatives from 16 jurisdictions: Alabama, California, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and West Virginia. The methodology involved in selecting these jurisdictions is described in Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 125 n.10 (1977). Two of these states, Rhode Island and South Dakota, had not recently conducted hearings or interviews. In each of the remaining fourteen, I obtained data from bar examiners or committee chairmen involved in the highest level of review. In Alabama, New Jersey, and Oregon, those providing information were involved in what is technically the second highest level of review since the final level is either rarely operational or essentially perfunctory. Alabama data were obtained from a state bar character committee rather than the state's board of examiners.

60. For discussion of the methodology involved in those aspects of the survey, see *infra* notes 258-60 and accompanying text.

To attain some appreciation of how moral character issues figure in law schools' admission and disciplinary processes, and the extent of congruence between bar and academic decisionmaking, I also interviewed a non-random sample of administrators from eighteen accredited schools.⁶¹ In selecting those institutions, I sought to insure representation along a variety of dimensions, including size, public or private status, prestige rankings, average LSAT scores of admittees, the percentage of applicants rejected, the presence of an evening school, religious affiliation, and geographic location.⁶²

B. *Screening Procedures*

An overview of various state certification processes reveals a shared structural premise but considerable diversity in implementation. In all jurisdictions, the bar retains control of character screening. Initial review powers typically reside in boards of bar examiners or character committees, subject to judicial oversight. Apart from the lower-level administrative staff, no non-lawyers are involved in the review process in over three-quarters of the states (39/50). Where non-attorneys serve on character committees or boards, they comprise, on the average, less than a quarter of the membership and are almost always chosen by the profession (i.e., courts or bar associations).⁶³

More detailed data from fourteen representative jurisdictions suggest that the individuals involved in the character screening process do not necessarily reflect the composition of the bar. Although the relevant committees and boards include substantial percentages of women (15%) and minorities (11%), there is relatively little representation from the third of the profession that is in solo practice (7%), or from the third employed by corporate, academic, or public interest organizations, or government (8%).⁶⁴ The forty percent of the bar that is under age thirty-five is simi-

61. The law schools were University of Chicago, De Paul, Idaho, Lewis & Clark, Maine, Minnesota, Richmond (T.C. Williams), Samford (Cumberland), Seton Hall, South Dakota, Stanford, Vanderbilt, University of Virginia, Wake Forest, Washburn, Wayne State, West Virginia, and Whittier.

62. The measure of prestige was taken from J. GOURMAN, *THE GOURMAN REPORT: A RATING OF GRADUATE AND PROFESSIONAL PROGRAMS IN AMERICAN AND INTERNATIONAL UNIVERSITIES* 71-77 (1983). To insure geographic and demographic diversity, I surveyed schools from each of the 16 states listed *supra* note 59, except Nevada and Rhode Island, which have no law school. I also added two institutions from Virginia, which accepts certification by law school deans as proof of moral character for graduates of in-state schools.

63. Lay members are chosen by the Governor in Maine and Alaska, subject to legislative approval; *see also infra* note 66 (discussing selection procedures).

64. For demographic figures on the profession, *see* Schwartz, *The Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269, 1274-75 (1980); B. Curran, *The Legal Profession in the 1980's: Selected Statistics from the 1984 Lawyer Statistical Report 4-7* (June 9, 1984) (unpublished manuscript on file with author).

larly underrepresented (16%).⁶⁵ Since bar organizations play a dominant role in selecting members, committees may also be skewed toward established, mainstream practitioners with the time and inclination for continuing involvement in professional associations.⁶⁶ Given the broad discretion exercised by these committees, any bias in their composition is likely to have some bearing on the form of misconduct they find disabling and the degree of scrutiny they accord candidates with particular backgrounds and law firm affiliations.⁶⁷

Although all states have a similar, professionally controlled certification structure, their procedures vary in centralization, scope, and formality. The review process begins with candidates' submission of applications, requiring various character-related information. The scope of inquiry, discussed in detail in Parts III and IV, differs among jurisdictions, but typically encompasses a wide range of criminal and civil misconduct, mental health matters, physical addictions, and educational, employment, and financial background. In some two-thirds of the states (64%; N=51), the staff of the board of bar examiners initiates further review by flagging applications with possible character difficulties. About another fifth of the states (22%) require interviews of all applicants, while the remainder generally rely on screening by various combinations of local committees, hired interviewers, and bar examiners.⁶⁸ Montana has no established procedures for review and has not, in recent memory, conducted an investigation. Virginia relies on in-state law schools to screen their graduates; local committees are responsible for those with out-of-state degrees.

Even among jurisdictions with comparable screening structures, the procedures for reviewing problem applicants differ considerably. Although all judicial denials of admissions must meet minimum due process standards of notice and an opportunity to be heard, bar administrative processes reflect quite different levels of procedural safeguards concerning evidentiary requirements, the scope and availability of hearings, administrative appeals, and written opinions.⁶⁹ In addition, the standard of review

65. B. Curran, *supra* note 64, at 3, 17.

66. In five of the 14 sampled states, the bar selects members, and in eight states the supreme court appoints them, in some instances on recommendation of the bar. Prior service to the bar is often the basis for appointment. As the Executive Director of the Oregon Board of Bar Examiners explained, individuals selected are those who have served in other capacities, such as graders of bar exams, so "the Board knows their work." Interview, Exec. Dir., Or. Bd. of B. Examiners (July 11, 1983).

67. See Shuchman, *supra* note 55, at 268-69 (big law firms control the organized bar and are thus able to impose their ethics on the profession).

68. Five jurisdictions (10%) have state or local committees screen applicant files, two (4%)—including California—rely on hired investigators or counsel, and two (4%) delegate the task to members of the Board of Bar Examiners. Since in Illinois an administrator screens Chicago applicants and local committees interview the remainder, the state is included in both the two-thirds and the one-fifth categories noted in text.

69. See *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963). When the applicant

for committee determinations varies across jurisdictions. Some state courts defer to the bar's assessments absent an "abuse of discretion, arbitrary action, fraud, corruption or oppression."⁷⁰ Other jurisdictions will determine applicants' qualifications *de novo* or resolve reasonable doubts in their favor.⁷¹ Whether the difference in standards makes for a substantial difference in outcomes is doubtful, given the inherent subjectivity of character determination at both the administrative and judicial levels. Thus, for example, in cases where a primary issue is rehabilitation and one might expect greatest deference to findings of fact, courts over the last half-century have disagreed with committees twice as often as they have agreed.⁷² Indeed, as the following discussion suggests, such disputes are inevitable under a structure that cannot adequately define or assess the character attributes on which decisions turn.

III. THE CERTIFICATION PROCESS RECONSIDERED

A. *The Central Premises of Character Review*

1. *Protecting the Public*

Those involved in the character certification process have almost uniformly identified its central justification as protecting the public. George Sharswood, author of a seminal nineteenth-century essay on professional ethics, put the claim expansively: Since our "fortunes, reputations, domestic peace . . . nay, our liberty and life itself" rest in the hands of legal

questions the truth of adverse information, the *Willner* decision suggests that he must have an opportunity to cross-examine the witness against him. *See id.* at 103-06.

Eight state bars make no provision for individual hearings or interviews (hereinafter referred to as hearings) (16%; N=51). Three of the states employing mandatory interviews have no further direct contact with the applicant (New York, Rhode Island, and Virginia). Five jurisdictions make no provision for hearings at any stage of the process (Iowa, Minnesota, Montana, Nebraska, and Washington).

About 40% of all states provide for one level of hearings; slightly over a third have two; and a few states (8%) have three. A more detailed analysis of the review process in the 14 representative states reveals further variation. Five states employ a trial format, three simply question the applicant, and the remainder proceed much like administrative agencies (e.g., the applicant can present witnesses and evidence subject to examination by committee or board members). About two-thirds of the jurisdictions permit the bar to present evidence (9/14), and three-quarters (11/14) keep a formal record. For discussion of the scope of interviews, see pp. 514-15, 575-76.

With respect to disposition, some jurisdictions provide written opinions in instances of denial; others simply issue an order or recommendation.

70. *In re Monaghan*, 122 Vt. 199, 205, 167 A.2d 81, 86 (1961); *see also In re Application of Warren*, 149 Conn. 266, 273, 178 A.2d 528, 532 (1962) (issue in review is whether committee "acted arbitrarily or unreasonably or in abuse of its discretion or without a fair investigation of the facts"); *In re Latimer*, 11 Ill. 2d 327, 330, 143 N.E.2d 20, 22 (review available only in cases of "an arbitrary refusal of a certificate"), *cert. denied and appeal dismissed*, 355 U.S. 82 (1957).

71. *Compare* *Application of Levine*, 97 Ariz. 88, 397 P.2d 205 (1964) *and* *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1957) *with* *Greene v. Committee of Bar Examiners*, 4 Cal. 3d 189, 480 P.2d 976, 93 Cal. Rptr. 24 (1971).

72. *See* Table 6, *infra* p. 536.

advocates, "[t]heir character must be not only without a stain, but without suspicion."⁷³ Variations on that theme have reechoed for a century in judicial decisions and scholarly comment. In Justice Frankfurter's view, lawyers stood

"as a shield" . . . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."⁷⁴

Those currently administering certification requirements generally articulate a similar rationale for the process, although with less fulsome rhetorical flourish.⁷⁵ In response to open-ended questions concerning their objectives in character review, bar examiners generally stressed a need to safeguard the public from the "morally unfit" lawyer; their goal was both to exclude individuals with "unsavory characters" or traits "not appropriate" for practitioners, and to deter those with "obvious" problems from seeking a license.⁷⁶

More specifically, courts and commentators have traditionally identified two prophylactic objectives for the certification process. The first is shielding clients from potential abuses, such as misrepresentation, misappropriation of funds, or betrayal of confidences. Since the "technical nature of law" and the attorney's "peculiar position of trust" place clients in a vulnerable position, individuals whom the state certifies as fit to practice

73. G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 172 (3d ed. Philadelphia 1869) (1st ed. n.p. 1854).

74. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring); see also *In re Monaghan*, 126 Vt. 53, 64, 222 A.2d 665, 674 (1966) (when courts review rejected applicants, "the standing of the profession must not be disregarded, nor must the court shrink from the performance of a clear duty however embarrassing"); Raymond, *The Role of the Law School Respecting Character and Fitness*, 35 B. EXAMINER 3, 3 (1966) (lawyer must "have such character and moral fitness as to bear the stamp of honesty so that he may be safely entrusted with his clients' property, their lives and their honor").

75. Interviewers asked those involved in the first level of screening in all 51 jurisdictions how they perceived their role in the certification process. In addition, bar committee or board chairpersons at the highest stage of review in representative jurisdictions were asked what they saw as the main purposes of the character and fitness process. Of those who identified a rationale for screening (N=21, first level; N=13, highest level), most offered somewhat conclusory statements about insuring the fitness of lawyers (41%), certifying those who meet the standard for admission (21%), or protecting the public (24%). A small percentage mentioned some other purpose, such as maintaining an appropriate public appearance or avoiding discredit to the bar. For discussion of responses received, see *infra* pp. 510-11.

76. Interview, Exec. Sec., Tenn. Bd. of B. Examiners (Oct. 15, 1982); Interview, Admin. Ass't, S.C. Comm. on B. Admiss. (Sept. 23, 1982); Interview, Chairman, S. Alabama Char. and Fitness Comm. (July 7, 1983); Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983).

should be worthy of the confidence reposed in them.⁷⁷ A second concern involves safeguarding the administration of justice from those who might subvert it through subornation of perjury, misrepresentation, bribery, or the like.⁷⁸

To achieve "[t]he greatest protection for the public, the courts, and potential clients," bar spokesmen have advocated "eliminating the diseased dogs before they inflict their first bite."⁷⁹ As a practical matter, it is thought "easier to refuse admittance to an immoral applicant than it is to disbar him after he is admitted."⁸⁰ The vast majority of attorney misconduct remains undetected, unreported, or unprosecuted, and bar disciplinary authorities have proved highly reluctant to withdraw individuals' means of livelihood.⁸¹ Given the difficulties of ex post policing, entry restrictions appear to be a logical means of maximizing public protection. The critical empirical question, however, is the effectiveness of current procedures in identifying those likely to engage in future misconduct.

2. *Preserving Professionalism*

A second, although less frequently articulated, rationale for character screening rests on the bar's own interest in maintaining a professional community and public image. In both its instrumental and symbolic dimensions, the certification process provides an opportunity for affirming shared values. As sociologists since Durkheim have argued, the concept of a profession presupposes some sense of common identity. Excluding certain candidates on character grounds serves to designate deviance, thus establishing the boundaries of a moral community.⁸² So too, requiring all applicants to account and, in some instances, to atone publicly for past misconduct is thought to serve important socialization and prophylactic

77. *In re Fla. Bd. of Bar Examiners*, 358 So. 2d 7, 9 (Fla. 1978); Alderman, *Screening for Character and Fitness*, B. EXAMINER, Feb. 1982, at 23, 24. See also Barnes, *Character Investigation within the Model Code for Admissions*, 38 B. EXAMINER 71, 71 (1969) ("[T]he public has a right to trust people who are admitted to the bar . . ."); Comment, *Character Fitness for Admission to the Bar*, 2 UCLA L. REV. 224, 224 (1955) ("[I]t is of the utmost importance that the lawyer should in every way warrant the faith reposed in him by his client.").

78. See Alderman, *supra* note 77, at 24; Walker, *Texas' Tests of Character Come Too Late*, 3 TEX. B.J. 177 (1940).

79. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law: The Law School Role; The Political Dissident*, 40 B. EXAMINER 17, 23 (1971).

80. Alderman, *supra* note 77, at 24; see *infra* notes 241-60 and accompanying text.

81. See *infra* pp. 548-50.

82. See generally H. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963); E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1933); E. DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* (1957); P. ELLIOT, *THE SOCIOLOGY OF THE PROFESSIONS* (1972); K. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* (1966); Becker, *The Nature of a Profession*, in NATIONAL SOCIETY FOR THE STUDY OF EDUCATION, *EDUCATION FOR THE PROFESSIONS* 27 (1962); Goode, *Community within a Community: The Professions*, 22 AM. SOC. REV. 194 (1957).

purposes.⁸³ Taken together, the application, affidavit, and interview processes also accords a certain formality to the profession's rites of entry that some members wish to preserve. As one New York Character Committee Chairman put it, "After all, this is a profession. Obtaining a license to practice law is not like getting a driver's licence [sic]"⁸⁴

Moreover, the appearance of moral exclusivity pays service to an ideal that retains some toehold in professional culture. Bar rhetoric traditionally has cast lawyers as "sentinels" and "high priests" at the portals of justice.⁸⁵ That self-portrait demands at least the pretense of purity. Those charged with upholding the law should not have defiled it; social pariahs ought not to serve as handmaidens of justice. As one former Executive Secretary of Manhattan's Character Committee explained, "A lawyer should be like Caesar's wife."⁸⁶

Weeding out the unworthy also helps to legitimate a status in which practitioners have strong psychological as well as economic stakes. An overriding objective of any organized profession is to enhance its members' social standing, and the bar is scarcely an exception.⁸⁷ To the contrary, this nation's historic ambivalence toward the legal profession has inspired particular concern among its elect. Although in fact, as de Tocqueville observed a century ago, attorneys may comprise "the American aristocracy" and its "political upper class,"⁸⁸ their position has been a matter of perennial public resentment. Animus toward lawyers has persisted for decades, and lawyers' presumed character deficiencies have inspired a well-worn literary genre. The public's "low regard for the profession," re-

83. See Carothers, *Character and Fitness: A Need for Increased Perception*, B. EXAMINER, Aug. 1982, at 25, 31 (noting that board will frequently interview applicants whose admission it nonetheless recommends, in order to confront them "with the unmistakable fact that their conduct is unacceptable").

84. Baris, *Why the Character Committee Interview is Unfit*, Nat'l L.J., Apr. 28, 1980, at 15, col. 4 (quoting Arthur Schwartz).

85. See, e.g., T. STRONG, JOSEPH H. CHOATE 130 (1917) (quoting Choate: lawyer is a "priest and possibly a high priest in the Temple of Justice"); Jackson, *Law and Lawyers: Is the Profession of the Advocate Consistent with Perfect Integrity?*, excerpted in THE LEGAL MIND IN AMERICA, *supra*, at 274, 283 ("sentinel," "guardian of morality," and "conservator of right"); Kent, *An Address Delivered before the Law Association of The City of New York, October 2, 1836*, 16 AM. JURIST 471, 472 (1836) ("sentinels"); Story, *Address Delivered before the Members of the Suffolk Bar, excerpted in THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 63, 71 (P. Miller ed. 1962) ("sentinels" and "faithful guardians"); MODEL RULES OF PROFESSIONAL CONDUCT, Chairman's Introduction, at iii (Proposed Final Draft, May 30, 1981) ("ministers"); *Report of the Committee on Code of Professional Ethics*, 29 REP. A.B.A. 600, 601 (1906) ("high-priests").

86. Papke, *The Watergate Lawyers All Passed the Character and Fitness Committee*, 2 COLUM. U.F. 15, 19 (1973) (quoting Theodore Freschi).

87. See generally B. BLESTEIN, THE CULTURE OF PROFESSIONALISM 98-105 (1976) (symbols of professional authority invoked to maintain dependence of clients); C. GILB, *supra* note 27, at 21-22 (suggesting that professionals are in some instances more powerful than government agencies with which they deal).

88. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 268 (G. Lawrence trans., J. Mayer ed. 1969) (1st ed. n.p. 1864).

flected in recent public opinion polls, is a matter of acute concern to practicing lawyers; ABA members have ranked it as the most urgent issue facing the bar, and ABA presidents have repeatedly pledged to make improving lawyers' image one of their highest priorities.⁸⁹

How exactly that improvement can be secured is a matter of dispute, but bar examiners frequently present character certification as part of the general campaign. In their view, a single unethical lawyer brings "disrepute to the whole profession," penalizing the thousand who slave "mightily and righteously."⁹⁰ To the extent that character review can "screen[] out . . . moral risks before they are admitted to practice . . . , the profession's priceless reputation" is well-served.⁹¹ Moreover, irrespective of the success of certification procedures in minimizing subsequent abuse, their existence may help to maintain confidence in lawyers' self-governance structures. As one examiner explained, it is important that the public "see we're trying to catch people"; such efforts are critical in "assur[ing] [sic] a credible bar."⁹²

From that perspective, certification appears to be an integral part of the general effort to legitimate the profession's regulatory autonomy and economic monopoly. The appearance of moral oversight may help both to preempt the call for external involvement in bar governance processes, and to buttress justifications for banning unregulated (and hence potentially unethical) competitors. As a former chairman of the Committee on Character and Fitness Examination of the National Conference of Bar Examiners pointedly observed, "[m]ovements are on foot in many states to stamp out the unauthorized practice of law by the layman. If these movements are to receive the sympathetic support of the general public, is it not desirable that the lawyer, in addition to being well educated, be also a man of character?"⁹³

89. Harris and Gallup public opinion data are summarized in *Those #*X!!! Lawyers*, TIME, Apr. 10, 1978, at 56; see also Bodine, *People of Wisconsin Trust Lawyers, Bar Survey Finds*, NAT'L L.J., Jan. 28, 1980, at 6, col. 1 (reporting state survey results). For representative responses to the public image problem, see *Project '77 Results: Incompetence Rising*, JURIS DOCTOR, July-Aug. 1977, at 23 (results of legal periodical's survey of its readers); Barrett, *Our Common Goal*, 44 TEX. B.J. 1331 (1981) (state bar president pledging to improve lawyers' image); Casey, *President's Message—We Have Miles to Go, Much to Do*, 50 CAL. ST. B.J. 455 (1975) (acknowledging public criticism of legal profession); Keating, *Where We Are; Where We Should Aim*, 60 MICH. B.J. 722 (1981) (same); Souers, *Annual Report of the President*, 54 OHIO ST. B. ASS'N REP. 961 (1981) (same).

90. Barnes, *supra* note 77; Interview, Member, Ill. Char. and Fitness Comm., 3d Dist. (July 18, 1983) (explaining role of character process improving "image of the profession which . . . is not the best image"); Interview, Chairman, Nev. Bd. of Law Examiners (July 12, 1983) (identifying avoidance of discredit to bar as major objective).

91. Farley, *Character Investigation of Applicants for Admission*, 24 B. EXAMINER 147, 158 (1955).

92. Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983); Alderman, *supra* note 77, at 25 (character evaluation protects "integrity and credibility" of bar).

93. *Character Investigation*, 18 B. EXAMINER 89, 90 (1949). For justifications of the professional

Even as a theoretical matter, however, this rationale for character screening remains problematic. While these professional interests help explain, they fail adequately to justify the bar's attachment to character screening. To prevent or deter individuals from entering a profession in order to promote the reputation, autonomy, or monopoly of existing members is troubling on constitutional as well as public policy grounds. Taken to its logical extreme, this rationale would support exclusion of any applicant whose conduct the local bar deemed unbecoming or likely to taint its public image. Particularly in a profession charged with safeguarding the rights of the unpopular, the price of such unbounded licensing discretion could be substantial. And it is difficult to construe the bar's parochial concerns as the kind of legitimate state interest normally required to restrain vocational choice.⁹⁴

In any event, as an empirical matter, it is questionable whether the certification process as currently administered inspires public confidence, and whether the system defines a moral community consistent with the profession's most enlightened instincts and ideals. As the following sections suggest, both structural and substantive constraints render current character screening procedures a dubious means of either protecting the public or preserving professionalism.

B. *Structural Problems in Current Procedures*

1. *Resource Constraints and the Limits of Character Investigation*

Among surveyed bar examiners, the most commonly cited problem in the certification process is the inadequacy of time, resources, staff, and sources of information to conduct meaningful character inquiries.⁹⁵ Com-

monopoly predicated on the bar's special ability to ensure ethical representation, see Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 90 n.369 (1981).

94. See, e.g., *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957) (definition of "good moral character" may reflect prejudices); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (any state qualification for bar admission must "have a rational connection with the applicant's fitness or capacity to practice law").

95. Interview, Chairman, Ill. Char. and Fitness Comm., 1st Dist. (July 11, 1983) (lack of information); Interview, Member, Ill. Char. and Fitness Comm., 3d Dist. (July 13, 1983) (usually only information is from applicant); Interview, Chairman, Me. Bd. of B. Examiners (Aug. 2, 1983) (limited resources to get information and short time period); Interview, Chairman, Kan. Bd. of Admissions (July 8, 1983) (constraints of time and expense); Interview, Chairman, Mich. Char. and Fitness Comm. (July 8, 1983) (inadequate time and too small an investigative staff); Interview, Supervising Attorney, Cal. Pre-Admission Investigation (Oct. 20, 1982) (investigations of out-of-state applicants difficult); Interview, Dir., Minn. B. Admissions, (Oct. 18, 1982) (insufficient staffing); Interview, Sec., Neb. St. B. Comm. (Sept. 23, 1982) (inadequate time and staff); Interview, Exec. Dir., Nev. St. B. (undated) (inadequate investigations); Interview, Chairman, N.Y. Char. and Fitness Comm., 6th Dist. (June 10, 1983) (process too cursory); Interview, Chairman, N.Y. Char. and Fitness Comm., 2d, 10th & 11th Dists. (June 11, 1983) (too large a workload); Interview, Admin. Ass't, S.C. Comm. on B. Admissions (undated) (inadequate facilities to investigate out-of-state residents); Interview,

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pounding those inadequacies is the unevenness of screening within and across jurisdictions. Some jurisdictions invest "minimal" effort in the enterprise (e.g., five hours a year for the total pool of applicants); others involve the equivalent of five full-time employees and thousands of hours of volunteer effort.⁹⁶

Particularly in less urban regions with decentralized committee systems, review can be quite cursory; in Missouri, for example, investigation may cease with a check on residency or a phone call to someone who knows or knows of the applicant.⁹⁷ Some examiners, who thought well of the candidate's law school or law firm, simply assumed that these institutions had adequately screened for character difficulties, or would contact the bar if there was cause for concern.⁹⁸ In other jurisdictions, review is more systematic. Half the states routinely check police records and contact at least some previous employers. Almost all jurisdictions demand personal references of varying number, and a substantial minority solicit other sources of information.⁹⁹

Chairman, Tenn. Bd. of B. Examiners (July 20, 1983) (uneven assistance from many local bars); Interview, Member, Va. Temporary Char. and Fitness Comm., 27th Dist. (July 6, 1983) (process not very thorough).

96. Administrators in Idaho, Maine, and Nevada reported minimal activity. See Interview, Bar Counsel, Idaho (Aug. 17, 1982); Interview, Sec., Me. Bd. of B. Examiners (Aug. 1, 1983); Interview, Exec. Dir., Nev. St. B. (July 8, 1983). A Kansas examiner gave the five-hour figure, and Montana reportedly conducts no investigations. See Interview, Disciplinary Admin., Kan. (July 7, 1983); Interview, Deputy Clerk, Mont. Sup. Ct. (June 8, 1983). The five-employee figure came from Washington, while Pennsylvania indicated up to eight hours per applicant. See Interview, Exec. Dir., Wash. St. B. (Aug. 23, 1982); Interview, Office Mgr., Pa. Bd. of Law Examiners (Oct. 19, 1982). Most respondents, however, were unable to provide meaningful estimates, given their decentralized structures, the overlap of personnel involved in character and competence screening, or reliance on uncompensated interviewers.

Chairpersons of bar fitness committees or boards of bar examiners from the 14 selected states invested anywhere from 8 to 500 hours a year in reviewing problem cases; the average was 108 hours (N=10).

97. Interview, Member, Mo. Screening Comm., 38th Cir. (June 9, 1983); Interview, Special Rep., Mo. B., 21st & 22d Dists. (June 20, 1983); Interview, Pres., Mo. Bd. of B. Examiners (June 7, 1983); see also Interview, Member, Ill. Char. and Fitness Comm., 3d Dist. (July 13, 1983) (noting quick procedure in most cases); *infra* p. 515.

98. Interview, Special Rep., Mo. B., 21st & 22d Dists. (June 20, 1983); Interview, Pres., Mo. Bd. of B. Examiners (June 7, 1983); see also Interview, Pres., W. Va. Bd. of B. Examiners (July 8, 1983) (fact that good law firm hired candidate relevant to decision to admit); Interview, Disciplinary Admin., Kan. (July 7, 1983) (relying on close contact with deans of state law schools). Similarly, examiners in New York's Manhattan district reportedly felt little need to scrutinize applicants with references from large corporate firms. See Papke, *supra* note 86, at 20.

A review of earlier examiner commentary reveals occasional intimations that those from "inferior" or night schools warrant closer scrutiny than other applicants. See *Character Investigation*, *supra* note 93, at 91 (remarks of William M. James, Comm. on Char. and Fitness Examination of the National Conf. of B. Examiners); Stevens, *Two Cheers for 1870: The American Law School*, in 5 *PERSPECTIVES IN AMERICAN HISTORY* 405, 463 n.79 (1971) (citing Richards, *Progress in Legal Education*, *HANDBOOK OF A.A.L.S.* 15 (1915)).

99. Such sources include motor vehicle records (42%); law school deans (34%); members of the bar (through published announcement of applicants) (7%); local banks (2%); high schools (2%); and records of litigation (6%) and military service (4%) (N=51).

The usefulness of much of this effort is, however, open to dispute. Most examiners found employers or personal references were "only rarely" or "virtually never" of assistance.¹⁰⁰ In some jurisdictions, the "helpfulness" of references may consist largely in pedigreeing applicants with mainstream professional and law school connections, while occasionally raising questions about those with less acceptable associations. The amount of adverse factual information revealed through personal recommendations is questionable. In California's experience, such references are useful in less than one percent of cases; employers are almost always positive or non-committal, and applicants are unlikely to list an individual who may provide adverse information.¹⁰¹

Although ten states supplement their investigations with mandatory interviews for all bar applicants, it is doubtful how much these personal interchanges add to the reliability of character assessment.¹⁰² Since the vast majority of applications present no evidence of misconduct, and examiners have no other sources of information, discussion is frequently perfunctory or somewhat desultory. Conversation will center on "what it means to be a lawyer," the candidate's background, his reasons for legal study, or areas in which he appears to need "guidance."¹⁰³ In certain New York districts, interviews consume only eight to fifteen minutes, and some of that time is spent discussing the weather, mutual acquaintances, and the applicant's future job prospects.¹⁰⁴ In other jurisdictions, substantive interchange is even more limited. According to one Virginia committee chairman, his "only purpose" is to determine whether the applicant

100. When asked how frequently employers provided information resulting in investigation, a little over a third of respondents said occasionally (39%); the remainder said rarely (23%) or virtually never (39%) (N=44). For obvious reasons, the references that applicants supply are of still more limited value. Only a quarter of respondents found such sources helpful even occasionally (25%); most said they were rarely (28%) or virtually never (47%) of assistance (N=43).

101. Interview, Supervising Attorney, Cal. Pre-admission Investigation (Oct. 20, 1982). *Accord* Interview, Chairman, N.Y. Char. and Fitness Comm., 3d Dist. (June 10, 1983); *see also* The Special Committee on Professional Education and Admissions of the Association of the Bar of the City of New York & The Committee on Legal Education and Admissions to the Bar of the New York State Bar Association, *Committee Report: The Character and Fitness Committees in New York State*, 33 THE RECORD 20, 48 (1978) (recommending deletion of third-party affidavits requirement since they do not develop useful information) [hereinafter cited as *N.Y. Comm. Rep.*]. Publishing candidates' names appears even less likely to prove illuminating. In Oregon, the practice has generated one phone call in the last four years. In short, as several examiners acknowledged, applicants who fail to disclose compromising conduct will frequently remain undetected.

102. Delaware, Indiana, Kentucky, Maryland, Nevada, New York, North Carolina, Ohio, Rhode Island, and West Virginia require interviews for all applicants. All Illinois applicants except those from the 1st District (Chicago) must be interviewed, and Virginia committees interview those from out-of-state law schools.

103. Interview, Sec., N.Y. Char. Comm., 2d Jud. Dep't (July 1983); Interview, Chairman, N.Y. Char. and Fitness Comm., 8th Dist. (July 15, 1983); Interview, Admin., N.H. Char. and Fitness Comm. (Aug. 19, 1982).

104. *N.Y. Comm. Rep.*, *supra* note 101, at 34.

has complied with residency requirements or committed a felony.¹⁰⁵ The objectives of other examiners are less apparent. One New York interviewer could not remember what his function was; he would have "to go back and read the books."¹⁰⁶ As another individual acknowledged, "a lot of lawyers don't know what they're supposed to do in these interviews."¹⁰⁷

Thus, limited resources and sources of information severely restrict the effectiveness of bar evaluative processes. The result, as some examiners noted, is that applicants can often "get by" through lying.¹⁰⁸ Yet, given other difficulties in the review system, it is unclear that a substantially greater investment of effort would significantly improve the reliability of character predictions.

2. *The Timing of Review and the Infrequency of Character Denials*

An inherent inadequacy in the certification process stems from the point at which oversight occurs. In essence, the current process is both too early and too late. Screening takes place before most applicants have faced situational pressures comparable to those in practice, yet after candidates have made such a significant investment in legal training that denying admission becomes extremely problematic.

Screening law school graduates, whose median age is about twenty-seven,¹⁰⁹ is in many respects premature. Most attorney misconduct involves white collar offenses, and most applicants have not yet occupied positions of trust that create the possibility for such abuses.¹¹⁰ Other chronic problems, such as alcoholism, from which later difficulties in practice might stem, are simply not predictable from applicant records.¹¹¹ As examiners frequently noted, candidates are generally too young to have made a record for themselves.¹¹² Several respondents felt they were reviewing "virgin babes in the woods," whose life histories gave little indication of how they would perform as attorneys.¹¹³

105. Interview, Chairman, Va. Temporary Interviewing Comm., 4th Dist. (June 20, 1983).

106. Interview, Chairman, N.Y. Char. and Fitness Comm., 6th Dist. (June 10, 1983).

107. Interview, Exec. Dir., Ind. Bd. of B. Examiners (Aug. 16, 1982).

108. Interview, Sec., N.Y. Char. Comm., 2d Jud. Dep't (July 1983); *see also* Interview, Member, Ill. Char. and Fitness Comm., 3d Dist. (July 18, 1983); Interview, Office Mgr., Pa. Bd. of Law Examiners (Oct. 19, 1982).

109. *See* Law School Admissions Services, Inc., Law School Admission Bulletin, Oct. 1984, at 5 (statistics on age of applicants to law school in spring 1984).

110. *See infra* p. 559; Center for Public Representation, Inc., Memorandum and Proposal for Change in the Good Moral Character Requirement for Bar Admission in Wisconsin 3 (June 16, 1976) (unpublished manuscript on file with author).

111. Interview, Chairman, N.C. Bd. of B. Examiners (July 8, 1983).

112. *See Character Investigation of Law Students*, 18 B. EXAMINER 189, 190 (1949) (panel discussion, remarks of Burton R. Sawyer, Minnesota bar examiner); *see also* Farley, *supra* note 91, at 158 ("Many applicants at the time of admission are so young they have not yet developed traits of character which can be detected and taken into account in the admission process.").

113. Interview, President-Elect, Idaho Bd. of Comm'rs (July 14, 1983); *see also* Farley, *supra*

Yet in another sense, bar screening is too belated. Once individuals have invested three years and thousands of dollars in their legal education, many examiners are reluctant to withhold certification.¹¹⁴ That reluctance undoubtedly helps account for the low incidence of applications denied on character grounds. In 1981, in the thirty-eight jurisdictions for which statistics were available, about 6.5% of all eligible candidates, approximately 1,931 individuals, were subject to non-routine character investigation.¹¹⁵ About 1.6% of all eligible candidates, roughly 594 individuals (N=45), received some form of administrative hearing. Forty-one percent of all states (N=41) rejected no applicant on grounds of moral character; the percentage of denials ranged from zero to two percent and the maximum number of individuals excluded in any jurisdiction was estimated at twelve to fifteen (California). In the forty-one states that could supply 1982 information, bar examiners declined to certify the character of approximately .2% of all eligible applicants, an estimated fifty-odd individuals. The only other empirical data available suggest that this percentage has remained relatively constant over the last quarter century.¹¹⁶

Not only are denials of admission infrequent, but not all rejected appli-

note 91, at 158 (many applicants too young to have developed character traits); Interview, Exec. Dir., Alaska B. (Oct. 5, 1982) ("some really bad apples have whistle clean written records"); Interview, Chairman, N.C. Bd. of B. Examiners (July 8, 1983) (how people will behave depends on problems that arise five years later).

114. See Interview, Chairman, N.Y. Char. and Fitness Comm., 7th Jud. Dist., 4th App. Dep't (Dec. 20, 1982). The point has frequently been made elsewhere. See, e.g., Donnelly, *Qualifications of Applicants Seeking to Take a Bar Examination*, 31 B. EXAMINER 78, 89 (1962) (examiners reluctant to jeopardize law students' investment); Glenn, *Registration at Beginning of Law Study and Character Examination*, 23 B. EXAMINER 35, 37 (1954) (earlier screening would help eliminate pressure toward leniency); Powell, *Comments on the Subject of the Panel Discussion*, 34 B. EXAMINER 116, 119 (1965) (because of likelihood of examiners' leniency, law schools should "screen out undesirables").

115. Those percentages remain approximate due to the limitations of the data available. "Eligible candidates" refers to the number of individuals subject to character review. Depending on when states begin their screening process, this figure includes either all applicants to the bar or only those who have passed the exam. For the 45 states supplying 1981 review data, statistics on the 1981 applicant pool were used. For the four states supplying 1982 survey figures, the applicant pool was calculated on the basis of 1982 figures. For statistics regarding the number of persons taking and passing the 1981 and 1982 bar examinations, see *1981 Bar Examination Statistics*, 51 B. EXAMINER, May 1982, at 25-27; *1982 Bar Examination Statistics*, 52 B. EXAMINER, May 1983, at 24-26.

Since not all states could provide information concerning the number of investigations, hearings, and denials, it was necessary to restrict the eligible applicant pool to include candidates only in the jurisdictions for which data were available. Certain further adjustments were made to reflect limitations in two states' statistics: New York could provide screening information only for certain districts, and South Carolina had data only on individuals taking the July exam. With those adjustments, the total number of eligible applicants in the 38 states supplying information about investigations was 29,500. In the 45 states providing statistics about hearings, the number of applicants was 38,063. The number of applicants in the 41 states supplying information about denials was 30,869.

116. See, e.g., Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 497 (1953) (estimates from New York, Illinois, and California indicating that less than .5% of applicants rejected on character grounds); Shafroth, *Character Investigation—An Essential Element of the Bar Admission Process*, 18 B. EXAMINER 194, 198 (1949) (California data suggest that about .5% of applicants were denied admission and .5% abandoned their applications for moral character reasons).

cants are ultimately foreclosed from practice. Some individuals will seek reconsideration, a practice encouraged in jurisdictions such as California, where candidates may reapply within two years without retaking the bar examination.¹¹⁷ Other individuals may migrate to less stringent jurisdictions or challenge their denials in court.¹¹⁸ Although the latter practice is relatively rare, those who appeal adverse decisions have a fair chance of success. A systematic survey of all state and federal cases involving applicants to the bar reveals only 102 reported decisions in the half century between 1932 and 1982, of which roughly half (52) occurred during the last decade. In many of those cases, judges are even more reluctant than examiners to withhold certification. During that fifty-year period, over a third (37%) of applicants gained admission, and an additional seven percent had their cases remanded.

These figures cannot, however, be taken as a measure of the screening process' overall effect. Statistics on denials afford no indication of the deterrent impact of licensing procedures, an impact compounded by other structural features of the certification process.

3. *The Uneven and Uncertain Scope of Scrutiny: The In Terrorem Effect of Certification*

Although no state ultimately withholds certification from large numbers of individuals, there is considerable variation in the frequency and form of review and its potential effect on the applicant pool. The percentage of applicants subject to non-routine investigation in any single state varies from zero to almost half, and the percentage of candidates receiving hearings ranges from zero to twelve percent. These differential screening rates are not without significance, since applicants who are investigated often drop out at an intermediate stage of the review process.¹¹⁹

In addition, as some examiners pointed out, a substantial group of individuals may be deterred from applying to law school or to a particular state bar out of concern that they will not be certified.¹²⁰ This deterrent

117. RULES REGULATING ADMISSION TO PRACTICE LAW IN CALIFORNIA Rule X § 104(A).

118. See *infra* pp. 529-31; see also *In re Monaghan*, 126 Vt. 53, 222 A.2d 665 (1966) (applicant who reapplied in same jurisdiction ultimately admitted); *In re Summers*, 325 U.S. 561 (1945) (unsuccessful challenge of denial of admission); *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976) (same), *cert. denied*, 430 U.S. 907 (1977), discussed *infra* note 364.

119. See Interview, Chairman, Tenn. Bd. of B. Examiners (July 20, 1983) (some applicants withdraw after report of the bar association); cf. Interview, Chairman, Ill. Comm. on Char. and Fitness, 1st Dist. (July 13, 1983) (twenty-five percent of applications trigger some form of investigation but relatively few receive hearing).

120. Cf. Custer, *Georgia's Board to Determine Fitness of Bar Applicants*, 51 B. EXAMINER, Aug. 1982, at 17, 21 (1982) ("The mere fact that the [f]itness [process] exists has doubtless resulted in a great number of applications never being filed."); Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983) (discussing "chilling effect" and "self-selection").

effect is enhanced by the general lack of information concerning certification criteria and administration. Only three states have published policies or guidelines on the specific types of conduct that prompt investigation, and no jurisdiction issues statistics on the number of character investigations or denials of certification. With relatively few exceptions, definitive advance rulings by character committees are also unavailable.¹²¹

This absence of notice did not appear to be a major concern to most current bar administrators. Although a few respondents expressed frustration at the absence of guidelines for their own decisionmaking, only one identified indeterminacy for applicants as a problem in the screening process.¹²² The prevailing assumption appeared to be that bar standards were self-evident; if the applicant had a character and fitness problem he "should know it."¹²³

In fact, as subsequent discussion will suggest, the subjectivity and inconsistencies in certification assessments make predictions—by the applicants or bar examiners—highly uncertain. That indeterminacy, together with the general lack of reliable information about the frequency and focus of adverse rulings, may dissuade some risk-averse individuals from attending law school or seeking to practice in a particular state, although their chances of rejection would in reality be minimal. Conversely, some small but not insignificant number of applicants each year overestimate their ability to obtain certification. To minimize such misjudgments, bar spokesmen have frequently advocated an earlier screening mechanism.

4. *The Limitations of Preliminary Screening: Law Schools and Pre-Registration Procedures*

Given the costs and difficulties of denying admission to those with substantial sunk costs in their legal education, bar examiners have often urged law schools to take an active role in character screening. Alternatively, some bar examiners have encouraged states to establish systems for registering and investigating the character of first-year law students. On the whole, neither proposal has met with great enthusiasm.

Many states experimented with law student registration procedures following endorsement of that approach in 1938 by the ABA and National

121. See *infra* p. 572-73.

122. Only the chairman of Oregon's Board of Bar Examiners expressed doubt that applicants had sufficient information about board criteria. Interview, Chairman, Or. Bd. of B. Examiners (July 19, 1983); cf. Interview, Chairman, Va. Temporary Char. and Fitness Comm., 26th Dist. (June 21, 1983) (lack of guidance as to meaning of interviewing process is problem).

123. Interview, Sec., Ariz. Char. and Fitness Comm. (Aug. 17, 1982).

Conference of Bar Examiners.¹²⁴ The rationale for registration was that it would enable administrators to conduct a thorough inquiry into a student's background before he invested substantial time, effort, and resources in his legal education.¹²⁵ Examiners would then inform applicants whether they might later have difficulty obtaining certification. Once bar officials had given such advice, they would feel "less pressure" to be "unduly lenient" in the final admission determination.¹²⁶ In addition, by drawing students' attention to the character inquiry, a registration program might help instill "professional attitudes" and deter "any kind of trouble or disturbance in the law school."¹²⁷ That such a system might also chill protected but controversial activity, or force premature character assessments, seems not to have been of major concern to most state bars. Rather, dissatisfaction with the program stemmed from more pragmatic considerations; few jurisdictions remained willing to conduct investigations both at law school entrance and graduation.¹²⁸ Only nine states currently have student registration and screening systems.¹²⁹

Given the absence of preliminary bar certification procedures, examiners have often advocated more serious attempts by law schools to "separate the sheep from the goats."¹³⁰ The response within academic institutions has been mixed. Although almost all law schools perform some screening,

124. See BAR EXAMINER'S HANDBOOK, *supra* note 2, at 126; Shafroth, *supra* note 116, at 205; *Proceedings of the House of Delegates*, 63 ANN. REP. A.B.A. 143, 176 (1938).

125. See sources cited *supra* note 114; Underwood, *Address at Joint Luncheon*, 39 B. EXAMINER 128, 131 (1970) (addressing National Conference of Bar Examiners and Section of Legal Education and Admission to the Bar).

126. Donnelly, *supra* note 114, at 84; Glenn, *supra* note 114, at 37.

127. Stevens, *Registration and Character Examination at Beginning of Law Study*, 24 B. EXAMINER 35, 43-44 (1955).

128. Donnelly, *supra* note 114, at 88-9; BAR EXAMINERS' HANDBOOK, *supra* note 2, at 126.

129. Alabama, California, Florida, Iowa, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, and Texas screen students at the time of registration. RULES GOVERNING ADMISSION TO THE ALA. STATE BAR Rules 1A, 1B; RULES OF THE SUPREME COURT OF FLORIDA RELATING TO ADMISSIONS TO THE BAR, Article 2, §§ 1, 5; RULES RELATING TO ADMISSION TO THE IOWA BAR Court Rule 112(1); Interview, Clerk, Iowa Sup. Ct. (Aug. 30, 1982); RULES GOVERNING ADMISSION TO THE MISSISSIPPI STATE BAR Rule III §§ 1, 3, Rule VIII § 4; Interview, Exec. Ass't, Miss. Bd. of B. Admission (Aug. 30, 1982); RULES GOVERNING ADMISSION TO THE BAR IN MISSOURI Rules 8.04, 8.07; SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO Rule 1 §§ 2, 3; RULES GOVERNING ADMISSION TO PRACTICE OF LAW IN THE STATE OF OKLAHOMA Rule 4 § 2; Interview, Admin. Dir., Okla. Bd. of B. Examiners (undated); RULES GOVERNING ADMISSION TO THE BAR OF TEXAS Rule III §§ (a)(1), (d); BAR EXAMINERS' HANDBOOK, *supra* note 2, at 160.

California requires students to register but does not conduct preliminary investigations. RULES REGULATING ADMISSION TO PRACTICE LAW IN CALIFORNIA Rules V, VI; Interview, Supervising Attorney, Cal. Pre-admission Investigation (Oct. 20, 1982). Although Maryland nominally requires law student registration, see BAR EXAMINERS' HANDBOOK, *supra* note 2, at 126, the process takes place only a year before the bar examination and essentially operates as the candidate's application to the bar. See RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND.

130. *Character Investigation*, *supra* note 93, at 91 (quoting W. James, Chairman, Comm. on Char. and Fitness Examination, Nat'l Conference of Bar Examiners).

most lack the "investigatory capabilities or inclination" to implement bar admission standards.¹³¹

In the vast majority of accredited law schools, character plays some role in admissions determinations. A 1970 poll revealed that eighty-five percent of administrators at those institutions believed character qualifications were relevant in the assessment of applicants.¹³² All but six current admissions applications have some questions concerning character; Table 1 summarizes the most common inquiries. As is apparent, the scope of concern varies considerably. Although the vast majority of schools are interested in adult (88%) or juvenile (81%) crimes and university disciplinary actions (81%), there is less consensus as to the relevance of physical and psychiatric problems (61%), arrests (14%) and charges (15%), pre-college academic discipline (41%), military offenses (55%), and personal references that speak to character issues (45%).¹³³

The extent to which such character information affects the composition of law school student bodies is difficult to gauge. Some individuals are reportedly deterred from seeking admission either by the disclosures demanded in application forms, or by advice from bar and law school administrators.¹³⁴ The *in terrorem* effect of these warnings, coupled with bar examiners' general disinclination to provide definitive policies or advance rulings, may help account for the small number of law school applicants rejected on character grounds. Among the eighteen surveyed schools, administrators estimated that less than one percent of applications presented

131. Interview, Dean of Students, Stanford Law School (July 19, 1983); see also BAR EXAMINERS' HANDBOOK, *supra* note 2, at 136 (unrealistic to expect law schools "to become significantly involved in making a judgment for which they are ill-equipped and at a time that may well be premature").

132. Weckstein, *supra* note 79, at 18. That response reflects a decline from a 1965 poll in which 96% of law school deans surveyed indicated that character qualifications were relevant to law school admissions. *Id.* See also Kempner, *Current Practices of Law Schools with Respect to Character Qualifications of Students*, 34 B. EXAMINER 106, 106-07 (1966) (discussing 1965 poll).

133. A minority of schools is interested in criminal charges (15%), arrests (14%), guilty or nolo contendere pleas (5%), indictments (4%), imprisonment (4%), or involvement as a party to criminal and/or civil proceedings (5%). A handful of schools also ask about probation, summons, warning, questioning, investigations, or the like.

134. About 12% of the schools include such advice on the application form or in the accompanying informational materials, and others have a similar warning in their bulletin. A few respondents reported counseling potential candidates to contact the bar, and some of these candidates reportedly withdrew or failed to complete their applications. Interview, Dir. of Admissions, Wake Forest Univ. School of Law (Aug. 9, 1983) (refers candidates to bar; reports withdrawals); Interview, Assoc. Dean, West Virginia Univ. College of Law (Aug. 3, 1983) (refers candidates to bar); accord Interview, Assoc. Dean, Washburn Law School (Aug. 1, 1983) (students directed to contact bar themselves); see also Interview, Admissions Dir., Wayne State Univ. Law School (Aug. 2, 1983) (students must sign release authorizing dean to disclose any disciplinary measures that may be taken); Interview, Ass't Dean, Univ. of Maine School of Law (Aug. 1, 1983) (students urged to contact state bar examiners if they have questions about potential barriers to admission).

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TABLE 1
ACCREDITED LAW SCHOOL APPLICATION FORMS (1983)

Percentage of Schools Inquiring about Criminal and Non-criminal Conduct (N=170)	
CRIMINAL	
Criminal convictions	74%
Including all misdemeanors	69%
Explicitly excluding juvenile offenses	5%
Criminal charges	15%
Arrests	14%
Guilty/No Contest pleas	5%
Indictments	4%
Imprisonment	4%
Involvement as party to criminal or any legal proceeding	5%
Any inquiry as to criminal involvement	88%
CIVIL	
Civil litigation	12%
Involvement in any case	8%
Fraud or other "dishonorable" conduct	4%
Academic disciplinary	81%
Pre-college incidents included	40%
Problems in the military	55%
Employment discharges	12%
Professional discipline	4%
License revocations and denials	4%
Physical & psychological problems or interruptions in study or work: e.g.,	61%
Serious health conditions	14%
Institutionalization	6%
Treatment for mental or emotional problems	5%
Bankruptcy	2%

serious moral character questions, and only about .3% resulted in denials.¹³⁵ Extrapolated to all accredited law schools, these percentages would suggest that some 1,000 individuals are prejudiced and 330 are denied admission each year on character grounds.¹³⁶

135. Based on estimates from the 18 surveyed schools, their applicant pool totaled approximately 28,814 individuals, and about .3%, or 86, candidates were denied admission on character grounds.

136. ABA figures reflect that 111,118 individuals applied to accredited law schools in 1983. *A Review of Legal Education in the United States Fall, 1983 Law Schools and Bar Admission Requirements*, 1984 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE B.; telephone interview with Jerry

Apart from self-selection by applicants, there are a number of other explanations for the low incidence of problem cases. Law schools generally lack the resources or inclination to conduct serious independent investigation. On the average, surveyed schools made character inquiries beyond those on the application for only about .1% of applicants, and in two-thirds of those cases consulted no sources beyond the candidate. If applicants withhold evidence of compromising conduct, it can easily remain undetected under current procedures. More importantly, the standard admissions criteria severely restrict the pool of applicants presenting serious character difficulties. For example, as one associate dean explained, problem candidates generally have criminal convictions, "messed up" lives and spotty undergraduate records.¹³⁷ Applicants with a "smoking gun" and unblemished academic credentials are rarely encountered.¹³⁸ And to the extent that institutions require a smoking gun before seriously prejudicing candidates, problem cases will arise infrequently.

When asked what sorts of conduct have raised significant moral character cases over the past five years, most administrators identified either criminal convictions (64%) or academic violations (36%). Some respondents mentioned questions of mental stability (14%) or candor on the application (21%). Of the reported candidates in 1983 denied admission for character-related reasons, over four-fifths (83%) had criminal convictions, typically felonies such as embezzlement or drug-related crimes. The remaining cases involved fraud, honor code problems, and mental breakdowns.

To obtain more detailed information, interviewers also inquired how law schools would probably respond to particular types of conduct by an applicant or current student. Table 2 summarizes these responses.

As these data suggest, and subsequent discussion will confirm, the concerns of law schools are not entirely congruent with those of bar examiners. In admitting candidates, educational institutions attach higher priority to academic misconduct and nondisclosure on law school application forms than do most state bars.¹³⁹ Indeed, prior surveys of accredited schools in the 1960's and 1970's disclosed that such conduct was one of the most likely factors to preempt admission on character grounds.¹⁴⁰ Moreover, most law schools expressed relatively little concern regarding matters that can be significant in bar character screening, such as bankruptcies, traffic,

Caulfield, ABA Consultant on Legal Education (July 17, 1984).

137. Interview, Assoc. Dean, Whittier College School of Law (July 28, 1983).

138. Interview, Assoc. Dean, Univ. of Minnesota Law School (July 28, 1983).

139. State bars are concerned, however, with lack of candor on their own applications. *See infra* p. 532-37.

140. *See Kempner, supra* note 132, at 108; Weckstein, *supra* note 79, at 19-20.

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TABLE 2

LAW SCHOOL RESPONSES TO APPLICANT OR STUDENT CONDUCT

	Conduct Would Be Significant Factor In Admission	Conduct Would Likely Lead To Disci- pline Or Expulsion	Conduct Would Be Reported To Bar
Criminal Conviction (assault, theft)	88%	50%	100%
Lack of Candor on Application	78%	73%	63%
Academic Misconduct	69%	73%	94%
Unauthorized Practice	64%	57%	76%
Drug Conviction	44%	13%	94%
Draft Offense	38%	0%	81%
Driving Offense	25%	0%	28%
Financial Mismanagement	20%	0%	29%
Psychological Treatment	13%	0%	6%
Other (sexual activity, political activity, bankruptcy)	0%	0%	0%

drug or draft offenses, psychiatric treatment, and sexual or political conduct.¹⁴¹ As Table 1 reflects, many law school applications make no inquiries in these areas. According to some administrators, neither drug possession nor bankruptcy is particularly reflective of character, and selective service resistance might assume positive weight.¹⁴²

A comparable divergence in attitude between the bar and its educators

141. Compare Tables 1 and 2 with Tables 3 and 4 and accompanying text, *infra* pp. 532-34. For example, only 2% of schools ask specifically about bankruptcy, and only 8% ask about all civil litigation. Almost 40% do not inquire about mental health problems. See, e.g., Interview, Admissions Dir., Wayne State Univ. Law School (Aug. 2, 1983) (school would generally have no information about criminal convictions, or driving or draft offenses).

142. Attitudes toward drugs and bankruptcy are discussed *infra* pp. 525-26; Interview, Assoc. Dean, Univ. of Idaho Law School (Aug. 3, 1983) (draft resistance could carry affirmative weight); Interview, Chairman, Admissions Comm., Washburn Law School (Aug. 1, 1983) (draft resistance would not count against anyone); cf. Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983) (draft resisters have been admitted); Interview, Ass't Dean, Univ. of Maine School of Law (Aug. 1, 1983) (draft offenses probably would not affect admission).

is apparent from law schools' approach to misconduct among admitted students. Again, the responses in Table 2 suggest that academic misconduct or dishonest applications would be far more likely to trigger academic sanctions or expulsion than much of the criminal or civil conduct that state character committees find most problematic.¹⁴³ Rarely will law schools expel students, even for offenses that might have preempted admission.¹⁴⁴ By contrast, bar examiners are more likely to attach significance to offenses that occur during, rather than before, legal education.¹⁴⁵

Such differences in perspective are apparent even as to conduct on which the academy and the profession seem most united: felony convictions and unauthorized practice of law. For some administrators, the issue was not whether a former convict should, or would, be able to obtain bar certification, but whether his presence would disrupt the school environment.¹⁴⁶ Similarly, unauthorized practice of law was a common concern since it could "imping[e] directly on the school"; violations of student practice rules might jeopardize an academic institution's ability to offer clinical education.¹⁴⁷ Yet such violations were not universally thought to reflect character and fitness to practice. Although some administrators would give unauthorized practice "heavy consideration," and one Virginia dean believed it would be more likely to result in denial of admission than any other factor, about one-third of surveyed law schools would not consider it a significant factor in admission,¹⁴⁸ and a quarter would not report it to the bar on character certification forms.

143. Compare Table 3 responses regarding criminal convictions, unauthorized practice, bankruptcy, and psychological problems with Table 2 responses regarding same. Survey data indicate that any criminal conduct is far more likely than academic misconduct or misrepresentation to result in bar investigation or non-certification, whereas such academic offenses were more likely than criminal conduct to bar an applicant from admission to law school.

144. See Table 2, *supra* p. 523. For example, students guilty of theft, embezzlement, or drug violations while attending law school have been permitted to graduate. Interview, Ass't Dean, Univ. of Maine School of Law (Aug. 1, 1983); Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983).

145. See, e.g., *In re Application of K.B.*, 291 Md. 170, 180, 434 A.2d 541, 546 (1981) (relevant that applicant had engaged in criminal activity in his senior year of law school, after having had "the benefit of four years of exposure to the ethics and traditions of the profession"); *In re Application of David H.*, 283 Md. 632, 637-39, 392 A.2d 83, 86-87 (1978) (quoting report of State Board of Bar Examiners holding that law school record indicated rehabilitation of applicant with record of pre-law-school arrests).

146. Interview, Ass't Dean, Univ. of Maine School of Law (Aug. 1, 1983); Interview, Ass't Dean, Univ. of Chicago Law School (July 7, 1983); Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983).

147. Interview, Ass't Dean, Wayne State Univ. Law School (Aug. 4, 1983); Interview, Dean of Students, Stanford Law School (July 19, 1983).

148. Compare Interview, Assoc. Dean, Whittier College School of Law (July 28, 1983) (unauthorized practice would not affect admission) with Interview, Chairman, Admissions Comm., Univ. of South Dakota School of Law (Aug. 17, 1983) (unauthorized practice would be given heavy consideration in admission determinations) and Interview, Ass't Dean, Univ. of Virginia School of Law (Aug. 5, 1983) (unauthorized practice would prevent admission). See Table 2, *supra* p. 523.

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Particular criminal offenses evoked comparable disagreement. One dean could not recall admitting any applicant with a felony or misdemeanor conviction and assumed that it was "the same at all selective law schools."¹⁴⁹ In fact, respondents from two of the top law schools in conventional prestige rankings reported accepting students with drug and theft offenses.¹⁵⁰ While some administrators had denied or reportedly would deny admission to those guilty of selling or possessing drugs, passing bad checks, driving while intoxicated, or theft,¹⁵¹ other institutions had or would come to contrary decisions.¹⁵² Arrests in connection with political activity might prove prejudicial at some institutions and helpful at others.¹⁵³ In part, such disparities reflect differences in individual administrators' attitudes toward rehabilitation. While some administrators were unwilling to prejudice applicants who had "served their punishment and learned their lesson," others were less inclined to overlook a serious offense, particularly if comparably qualified candidates were available.¹⁵⁴

There was equally little consensus concerning the relevance of various noncriminal conduct. Financial mismanagement, such as a history of bad checks, would not affect admission at a third of the schools, would be

149. Interview, Ass't Dean, Univ. of Virginia School of Law (Aug. 5, 1983). Convictions stemming from college political demonstrations were among those he considered to raise a moral turpitude issue warranting serious review.

150. Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983) (drugs); Interview, Ass't Dean, Univ. of Chicago Law School (July 28, 1983) (theft). The Chicago case involved an individual who used a "black box" to make long distance phone calls without paying for them.

151. Interview, Ass't Dean, Univ. of Virginia School of Law (Aug. 5, 1983) (possession or sale of drugs and history of bounced checks); Interview, Chairman, Admissions Comm., Univ. of South Dakota School of Law (Aug. 17, 1983) (sale of drugs); Interview, Assoc. Dean, Washburn Univ. School of Law (Aug. 1, 1983) (conviction for bounced check one factor); Interview, Assoc. Dean, Univ. of Idaho College of Law (Aug. 3, 1983) (driving while intoxicated); respondent who preferred not to be identified (embezzlement); *see also* Table 3, *infra* p. 533.

152. Interview, Dean, T.C. Williams School of Law, Richmond (Aug. 16, 1983) (drugs); Interview, Dean of Admissions, Seton Hall Univ. School of Law (July 29, 1983) (drugs); Interview, Assoc. Dean, Univ. of Idaho College of Law (Aug. 3, 1983) (drugs, larceny); Interview, Chairman, Admissions Comm., Univ. of South Dakota School of Law (Aug. 17, 1983) (bounced check); Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983) (assault, theft); Interview, Ass't Dean, Univ. of Chicago School of Law (July 28, 1983) (theft). Some institutions do not ask about most offenses. *See* Interview, Admissions Dir., Wayne State Univ. Law School (Aug. 2, 1983); *see also supra* p. 522.

153. *Compare* Interview, Ass't Dean, Univ. of Virginia School of Law (Aug. 5, 1983) (arrest would not affect admission decision) *with* Interview, Assoc. Dean, Washburn Univ. School of Law (Aug. 1, 1983) (arrest might be given "affirmative weight"). *See also* Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983) (admission might depend on whether destruction of property involved); Interview, Ass't Dean, Univ. of Maine School of Law (Aug. 1, 1983) (disclosing political activity might depend on whether violence or subversive intent present).

154. *Compare* Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983) (expressing doubt whether one who has "paid his debt to society" should be excluded) *and* Interview, Admissions Dir., Wayne State Univ. Law School (Aug. 2, 1983) (same) *with* BAR EXAMINERS' HANDBOOK, *supra* note 2, at 135 (noting concern that limited places should go to those of proven good character) *and* Interview, Assoc. Dean, De Paul Univ. College of Law (July 28, 1983) (noting that felony offenders are likely to be excluded).

significant at a fifth, and might prove important at the remainder. Administrators divided almost evenly as to whether such conduct might result in discipline or disclosure to the bar; some schools declined to become involved in "collection" problems, whereas others felt that such matters warranted attention, since they have a "great deal to do with a person's character and integrity."¹⁵⁵

Mental health issues were similarly divisive. To some administrators, treatment for psychological or emotional disorders would be relevant in assessing the ability of an applicant or lawyer to withstand pressure, and they would report serious mental health problems to the bar.¹⁵⁶ Other institutions do not ask about the issue, and their administrators would be unsure what to do with the answers if they did.¹⁵⁷ Some respondents felt that such matters were confidential, and noted that individuals who have had psychological or psychiatric treatment might cope with stress as well as, or better than, those who have not sought assistance.¹⁵⁸

Similar disparities in attitude have emerged in prior surveys of law school administrators. For example, research in the 1970's revealed that accredited law schools were sharply divided over whether to exclude or discipline individuals who had sold hard drugs, engaged in disruptive political demonstrations, or been convicted of offenses involving moral turpitude.¹⁵⁹ One more recent survey found that plagiarism is equally contro-

155. Interview, Assoc. Dean, Univ. of Idaho College of Law (Aug. 3, 1983). Compare Interview, Dean of Students, Stanford Law School (July 19, 1983) (no involvement in "private transactions" raising "collection problems") and Interview, Dean of Admissions, Seton Hall Univ. School of Law (July 29, 1983) (noting instance in which bad check had not affected character recommendation to bar) with Interview, Assoc. Dean, Univ. of Idaho College of Law (Aug. 3, 1983) (mismanagement "would get attention") and Interview, Assoc. Dean, Seton Hall Univ. School of Law (July 29, 1983) (any serious mismanagement might raise disciplinary issue). See also Interview, Chairman, Admissions Comm., Univ. of South Dakota School of Law (Aug. 17, 1983) (faculty concerned with mismanagement); Interview, Ass't Dean, Univ. of Maine School of Law (Aug. 1, 1983) (financial mismanagement of concern).

156. Associate Deans at De Paul, South Dakota, and Whittier indicated that treatment had been or would be a factor in admissions, and Associate Deans at Idaho and Vanderbilt would report serious problems. Interview, Assoc. Dean, De Paul Univ. College of Law (July 28, 1983); Interview, Chairman, Admissions Comm., Univ. of South Dakota School of Law (Aug. 17, 1983); Interview, Assoc. Dean, Whittier College School of Law (July 28, 1983); Interview, Assoc. Dean, Univ. of Idaho College of Law (Aug. 3, 1983); Interview, Assoc. Dean, Vanderbilt Univ. School of Law (Aug. 10, 1983).

157. See *supra* p. 522; Interview, Admissions Dir., Wayne State Univ. Law School (Aug. 2, 1983); Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983).

158. Interview, Chairman, Admissions Comm., Stanford Law School (July 18, 1983); Interview, Dean of Students, Stanford Law School (July 19, 1983).

159. See Weckstein, *supra* note 79, at 19-21 (51% would exclude individuals convicted of selling hard drugs, 57% would exclude those with moral turpitude offenses, 56% would discipline students convicted of a felony, and 35-39% would discipline students engaged in disruptive activity); see also Kempner, *supra* note 132, at 107-08 (noting variety of schools' approaches to such issues). During the mid-1960's and early 1970's, a significant minority of law schools reported that they would deny admission to applicants with misdemeanor convictions, selective service offenses, or large numbers of traffic violations, and would take "a hard look at sexual misbehavior or homosexual activity." Weckstein, *supra* note 79, at 19-21; Kempner, *supra* note 132, at 109 (discussing expulsion due to sexual

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versial.¹⁶⁰ Such diversity in perspectives reflects not only the inherent subjectivity of character determinations, but also fundamental disagreements regarding the general role of law schools in the certification process. As these prior studies reflect, academic institutions traditionally have been ambivalent about their obligations to screen potential practitioners. In one 1970 survey, accredited law schools were almost evenly divided over whether they would admit an academically qualified applicant who posed no threat of danger to the academic community but who probably would be denied admission to the bar on grounds of moral character.¹⁶¹

That disagreement persists. Of the twenty-three faculty and administrators interviewed in this study, ten (43%) believed they should not perform a screening function for the bar. In their view, academic institutions should assess fitness for the study of law, as opposed to the practice of law.¹⁶² Their role was not to act as a "police body" for the profession, or to "crank out" only practicing attorneys, but rather to provide legal education for individuals "capable of receiving it and using it in some socially beneficial way."¹⁶³ By contrast, thirteen faculty and administrators (57%) felt that law schools had an obligation to assess character and fitness. Some respondents felt that eligibility for practice should play a role in allocating limited educational opportunities.¹⁶⁴ Others were reluctant to graduate individuals who might "disserve the general public"; potential practitioners should be "persons of good moral character . . . able to handle a position of trust [in] dealing with people[']s money, property and affairs."¹⁶⁵ Thus, one director of admissions indicated that she would like to see the law schools "play a much stronger role than [they] do There are so many lousy lawyers who, I imagine, grew out of lousy little boys."¹⁶⁶

Yet even among those institutions committed to screening potential practitioners, not all were inclined or equipped to apply bar standards.

behavior).

160. Comment, *Plagiarism in Legal Scholarship*, 15 U. TOL. L. REV. 233 (1984).

161. Weckstein, *supra* note 79, at 25 (40.3% would admit such an applicant; 45.5% would not).

162. Interview, Chairman, Admissions Comm., Univ. of South Dakota School of Law (Aug. 17, 1983).

163. Interview, Assoc. Dean, West Virginia Univ. College of Law (Aug. 3, 1983). See Interview, Ass't Dean, Univ. of Maine School of Law (Aug. 1, 1983); Interview, Ass't Dean, Univ. of Minnesota Law School (July 28, 1983); see also Interview, Former Assoc. Dean, Seton Hall Univ. School of Law (July 29, 1983) (responsibility for screening practitioners lies with state bar); Interview, Dean of Students, Stanford Law School (July 19, 1983) (law schools should not screen students for bar admission).

164. Interview, Assoc. Dean, Seton Hall Univ. School of Law (July 29, 1983); Interview, Dir. of Admissions, Vanderbilt Law School (July 29, 1983); see also note 154.

165. Interview, Assoc. Dean, Whittier College School of Law (July 28, 1983); Interview, Dean, Cumberland School of Law, Samford Univ. (Aug. 9, 1983); accord Interview, Assoc. Dean, Wake Forest Univ. School of Law (Aug. 9, 1983).

166. Interview, Admissions Dir., Wayne State Univ. Law School (Aug. 2, 1983).

Two-thirds of the surveyed schools lacked information about how state bars would respond to particular forms of misconduct, and only eleven percent indicated that the bar's reaction would be likely to affect their admissions decisions. Over four-fifths of the law schools had no contact with character and fitness committees regarding general admissions practices or individual cases. Even with more information, the "haphazard" and "unpredictable" character of reported decisions might present problems for schools seeking to apply bar standards.¹⁶⁷

Nor have law schools played an active role in informing bar character committees about potential problems. Surveyed schools reported disclosing character-related matters on application forms for an average of only .4% of their graduates over the past five years. During that period, only two law schools had voluntarily initiated contact with the bar regarding a particular candidate.¹⁶⁸ Those statistics are particularly striking, given that thirty states require applicants to present certificates of character from their law schools.

A number of factors may contribute to the infrequency of adverse disclosure. As noted earlier, many administrators either are disinclined to serve a policing function for the profession, or dispute its vision of probative conduct. Yet even law schools most sensitive to bar standards face severe constraints in applying them; many are not in a position to learn about matters that could raise serious concerns.¹⁶⁹ For example, in Virginia, where certification by in-state law schools operates as proof of fitness to practice, interviewed administrators raised questions about the adequacy of their screening role. As the Dean of the University of Virginia Law School noted, bar examiners "seem to think of law schools as small homey places where everyone knows everyone The belief that I am a good judge of character of the 375 students that emerge from here every year is mind-boggling I am not a good judge of candor, let alone character."¹⁷⁰ During his six-year tenure, the Dean of the T.C. Williams School of Law in Richmond has never failed to certify a student.¹⁷¹

In short, although law schools obviously perform some character screening, they are unlikely to assume more major responsibilities in certifying the moral fitness of their graduates. A substantial number of academic institutions are opposed in principle to assuming that function, and all

167. Interview, Former Assoc. Dean, Seton Hall Univ. School of Law (July 29, 1983).

168. Wayne State had made such contacts concerning about .5% of its applicants. Interview, Admissions Dir., Wayne State Univ. Law School (Aug. 2, 1983). De Paul had done so with respect to about .1% of students. Interview, Assoc. Dean, DePaul Univ. Law School (July 28, 1983).

169. Interview, Dean, Univ. of Virginia School of Law (Aug. 9, 1983); Interview, Dean of Students, Stanford Law School (July 19, 1983).

170. Interview, Dean, Univ. of Virginia School of Law (Aug. 9, 1983).

171. Interview, Dean, T.C. Williams School of Law, Richmond (Aug. 16, 1983).

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face considerable practical difficulties in applying bar standards. Most administrators lack adequate information concerning applicants, students, and bar character criteria, and many do not share examiners' perceptions about disabling conduct. Once they have admitted a student, law schools are unlikely to expel him for nonacademic offenses, or to disclose to bar examiners prejudicial information apart from criminal sanctions. Given these constraints, examiners will inevitably confront some applicants with blots on their record and substantial sunk costs in their education. As the following section will suggest, the results of those confrontations have not been entirely satisfactory.

C. *Substantive Problems in Character Assessment*

1. *The Subjectivity of Admission Standards*

As the most recent Bar Examiners' Handbook candidly concedes: "No definition of what constitutes grounds for denial of admission on the basis of faulty character exists."¹⁷² On the whole, judicial attempts to give content to the standard have been infrequent and unilluminating. In part, the problem stems from the inherent subjectivity of any concept of moral fitness. Character requirements are, as the Supreme Court once acknowledged, "unusually ambiguous. . . . [A]ny definition will necessarily reflect the attitudes, experiences, and prejudices of the definer."¹⁷³ In Justice Holmes's phrase, the standard expresses "an intuition of experience which outruns analysis."¹⁷⁴ Perhaps for that reason, the Court has largely avoided the analytic enterprise. Rather, the majority has rested with the general observation that any criteria of character must have a "rational connection with the applicant's fitness or capacity to practice law."¹⁷⁵

More specifically, in *Konigsberg v. State Bar of California*, the Court focused on whether a "reasonable man could fairly find that there were substantial doubts about [the applicant's] 'honesty, fairness and respect for the rights of others and for the laws of the state and nation.'"¹⁷⁶ Following *Konigsberg*, a number of courts have applied analogous standards.¹⁷⁷

172. BAR EXAMINERS' HANDBOOK, *supra* note 2, at 123.

173. *Konigsberg v. State Bar of California*, 353 U.S. 252, 263 (1957) (footnote omitted); *see also* Application of Klahr, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1962) ("[T]he concept of 'good moral character' escapes definition in the abstract. Instead . . . an *ad hoc* determination in each instance must be made by the court.").

174. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring) (quoting *Chicago, Burlington & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907)).

175. 353 U.S. at 239 (majority opinion).

176. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 264 (1957) (quoting explanation of "good moral character" presented in oral argument by State Bar).

177. *See* *Reese v. Board of Comm'rs*, 379 So. 2d 564, 568-69 (Ala. 1980); *Florida Bd. of Bar Examiners. Re. G.W.L.*, 364 So. 2d 454, 458-59 (Fla. 1978); *In re* Florida Bd. of Bar Examiners,

The difficulty, of course, is that reasonable men can readily disagree about what conduct would raise substantial doubts, a point amply demonstrated by the divergence of views among judges, bar examiners, and law school administrators.

Nor have alternative legislative and judicial formulations added greater determinacy to the character requirement. The most facially precise approach is to catalogue relevant traits such as honesty, candor, trustworthiness, and respect for law.¹⁷⁸ A few states also specify certain discrete acts that will preempt admission: advocacy of violent revolution, failure to disclose information relating to civil, criminal or disciplinary proceedings, disbarment by another state, or conviction of a felony without restoration of civil rights.¹⁷⁹ No state, however, restricts the bar's power to exclude applicants to those who have committed such offenses, and trait-based standards are highly indeterminate in practice. Some of the criteria are particularly subjective (e.g., taking "unfair advantage of others," being "disloyal to those to whom loyalty is legally owed," or acting "irresponsibl[y] in business or professional matters"¹⁸⁰). Moreover, the definitional framework specifies no way of differentiating between mortal and venial sins, or of assessing countervailing factors such as the remoteness of the offense and evidence of rehabilitation. Since such factors will be evaluated with reference to the applicant's "entire life history" rather than as isolated events,¹⁸¹ cataloguing traits does little to constrain bar discretion.

Even greater indeterminacies characterize the most common alternative approach, which is to invoke some broad conclusory definition of virtue. For example, the Oregon Supreme Court demands "ethically cognizant and mature individuals [able] to withstand . . . temptation[.]"¹⁸² Other

373 So. 2d 890, 892 (Fla. 1979); *In re Latimer*, 11 Ill. 2d 327, 336, 143 N.E.2d 20, 25 (1957); Application of Gahan, 279 N.W.2d 826, 829 (Minn. 1979).

178. RULES RELATING TO ADMISSION TO THE IOWA BAR Rule 103; Tennessee State Bd. of Law Examiners, Memorandum to Local Bar Associations (undated).

179. See ARKANSAS RULES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW Rule X (disbarment); RULES REGULATING ADMISSION TO PRACTICE LAW IN CALIFORNIA Rule X § 101(b) (overthrow of government grounds for denying admission); RULES OF THE SUPREME COURT OF KENTUCKY RELATING TO THE ADMISSION OF PERSONS TO PRACTICE LAW Rule 2.010(1) (overthrow of government); RULES GOVERNING ADMISSION TO THE MISSISSIPPI STATE BAR Rules IV § 2, VIII § 6 (failure to disclose information relating to criminal or disciplinary proceedings); RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA Rule .0603 (failure to disclose misconduct); Florida Board of Bar Examiners, Application for Admission to the Florida Bar (March 1981) (conviction of felony without restoration of civil rights or reprehensible conduct that would warrant disbarment); see also RULES OF THE NEVADA SUPREME COURT Rule 52 § 5 (false statement on application sufficient cause for denial of admission); WYO. STAT. § 33-5-107 (1977) (fraudulent application sufficient cause for revoking admission).

180. RULES GOVERNING ADMISSION TO THE BAR OF THE STATE OF COLORADO Rule 212; RULES GOVERNING ADMISSION TO THE MISSISSIPPI STATE BAR Rule 8 § 6.

181. Florida Board of Bar Examiners, *supra* note 179; Commonwealth of Massachusetts Board of Bar Examiners, Evaluation of Moral Character (undated memorandum on file with author).

182. *In re Application of Alpert*, 269 Or. 508, 518, 525 P.2d 1042, 1046 (1974); *In re Lubonovic*,

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states, such as North Carolina and Arizona, have emphasized affirmative qualities:

[Upright character] is something more than an absence of bad character. . . . [A candidate] must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong.¹⁸³

Yet, by presupposing a consensus on what conduct reflects ethical or upright character, these definitions simply finesse the question at issue. Moreover, the requirement of affirmative qualities invites hypocrisy. None of the states in which that mandate is applicable conducts a meaningful review of the positive, self-sacrificing attributes that the definition presumably encompasses. The applicants denied admission in these jurisdictions, like those excluded elsewhere, have committed some discrete, negative act such as driving while intoxicated, selling marijuana, evading income taxes, avoiding draft registration, or failing to disclose relevant facts.¹⁸⁴

Finally, many courts have avoided difficulties of definition by simply dispensing with the formality. During 1970–80, approximately half of the reported moral character decisions failed to specify the criteria applied. Judges have often simply announced that the candidate does or does not have the requisite character, occasionally without even indicating the conduct at issue.¹⁸⁵

Although such laconic approaches raise obvious due process issues, it is dubious whether the more facially forthcoming alternatives would afford greater guidance to applicants or significantly affect decisionmaking. In-

248 Ga. 243, 244, 282 S.E.2d 298, 300 (1981); *In re Cason*, 249 Ga. 806, 809, 294 S.E.2d 520, 523 (1982); see also *In re Ascher*, 81 Ill. 2d 485, 500, 411 N.E.2d 1, 8 (1980) (to secure admission, applicant must have "capacity to make those ethical judgments required of an attorney in the course of his practice and the performance of his fiduciary responsibilities").

183. *In re Application of Farmer*, 191 N.C. 235, 238, 131 S.E. 661, 663 (1926).

184. *In re Willis*, 288 N.C. 1, 215 S.E.2d 771, *appeal dismissed sub nom.* Willis v. North Carolina State Bd. of Law Examiners, 423 U.S. 976 (1975) (candor; driving while intoxicated); *Application of Walker*, 112 Ariz. 134, 539 P.2d 891 (1975) (failure to register for draft; candor); *In re Application of Greenberg*, 126 Ariz. 290, 614 P.2d 832 (1980) (illegal sale of marijuana; failure to report income to IRS; candor).

185. See, e.g., *Application of Appleman*, 280 A.D. 865, 113 N.Y.S.2d 780 (N.Y. App. Div. 1952) (no discussion of applicant's conduct or of rationale for decision); *In re Weinstein*, 150 Or. 1, 9, 42 P.2d 744, 747 (1935) ("It would be of no interest to the public and would not help the petitioner, who is a young man with a future that could be turned to good account . . . , to set out the acts . . . which impelled the referee to report adversely on his hearing."); see also Carothers, *Character and Fitness: A Need for Increased Perception*, 51 B. EXAMINER, Aug. 1982, at 25, 32 (courts too often order admission without explaining basis for further action).

deed, as the discussion below suggests, certification decisions have proved highly idiosyncratic, whatever the substantive standard.

2. *The Idiosyncracies of Implementation*

a. *The Focus of Professional Concern*

At an abstract level, courts and bar committees have similar convictions about what traits are undesirable in candidates for their profession. Conduct evidencing dishonesty, disrespect for law, disregard for financial obligations, or psychological instability triggers serious concern. Yet, at a more concrete level, there is considerable divergence of views as to what prior acts are sufficiently probative to warrant delaying or withholding certification. From a public policy perspective, the justifications for certain of the bar's concerns are less than convincing.

As Appendix I reflects, bar applications request a wide array of information regarding personal background, education, employment, civil or criminal involvement, and mental health. To obtain some sense of how this information is used, interviewers asked bar administrators in all fifty states to identify the types of conduct most commonly resulting in character investigations and denials of certification, as well as how they would likely respond to certain specified activities. Similar questions were put to bar committee and board chairmen involved in the highest stages of review in fourteen selected jurisdictions.¹⁸⁶

As a comparison of Tables 3 and 4 makes evident, and as examiners confirmed, bar investigations extend to matters that rarely preempt admission and almost never trigger inquiry for practicing attorneys. For example, most states would investigate bounced checks (76%), marijuana possession (67%), involvement in litigation (52%), and high levels of debt (56%). Examiners in other jurisdictions might investigate these matters, as well as other activity implicating privacy and First Amendment concerns, such as psychiatric treatment (98%), misdemeanor convictions arising from a sit-in (80%), and sexual conduct or lifestyle (49%).

There was, however, little consensus as to what types of conduct were most likely to prove disabling. Among the responding states, the only factor commanding close to a majority was a criminal record (47%). And as subsequent discussion will indicate, views concerning particular forms of illegal activity varied widely. A review of reported judicial decisions over

186. Most chairmen of state bar committees and boards of examiners were unwilling definitively to predict the consequences of specified activity. Their most useful responses came in reference to a question asking what sorts of conduct their committees would find most troubling. See Table 3, col. 3.

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TABLE 3

BAR ADMINISTRATORS' SPECIFICATION OF CHARACTER PROBLEMS (OPEN-ENDED RESPONSES)

	Percentage of jurisdictions citing conduct as among that most likely to result in investigation ¹ N=41	Percentage of jurisdictions citing conduct as among that most likely to result in non-certification ² N=19	Percentage of bar chairmen citing conduct as among that most likely to cause difficulty N=13
Criminal Record	63%	47%	38%
Drug Problems or Charges	29%	11%	38%
Traffic Offenses	29%	—	—
Shoplifting	7%	5%	8%
Dishonesty Misrepresentation or Non-disclosure	29%	16%	31%
Unauthorized Practice of Law	7%	16%	8%
Bankruptcy	2%	11%	15%
Psychological Problems	20%	11%	15%
Alcoholism	10%	5%	38%
Involvement in Civil Litigation	15%	—	8%
Fraud	5%	5%	15%
Cheating/Plagiarism	15%	5%	8%
<p>1. Other conduct likely to result in investigation included financial irresponsibility (2%); dishonored checks (2%); school discipline (2%); unexplained periods between employment.</p> <p>2. The questionnaire asked what forms of conduct the committee would find most troubling. Conduct beyond that listed included: serious crimes (15%); murder (15%); series of resisting arrest (8%); breaking and entering (2%); job misconduct (8%); mishandling other individuals' money (8%).</p>			

TABLE 4
BAR ADMINISTRATORS' RESPONSES TO SPECIFIED APPLICANT CONDUCT

	Generally Would Trigger Investigation	Might Trigger Investigation	Would Never Trigger Investigation
Activist Political Activity (N=44) ¹	25%	55%	20%
Allegations of Unautho- rized Practice (N=49)	84%	12%	4%
Bankruptcy (N=51)	59%	33%	8%
Problems with Bounced Checks (half a dozen) (N=49)	76%	20%	4%
Driving while Intoxicated (N=49)	63%	35%	2%
High Levels of Debt (N=43)	56%	39%	5%
Involvement in Litigation (N=46)	52%	43%	5%
Marijuana Possession (Misdemeanor) (N=48)	67%	27%	6%
Psychiatric Treatment (N=47)	72%	26%	2%
Sexual Conduct or Lifestyle (N=39) ²	10%	39%	51%
<div>1. E.g., sit-ins resulting in misdemeanor charges, membership in a radical political organization.</div> <div>2. E.g., homosexuality, cohabitation.</div>			

the last half-century reflects similar diversity in perspective. Tables 5 and 6 reveal that courts reversed or remanded bar determinations in 43% of all cases, a percentage that has remained relatively constant over the half-century studied. Criminal convictions, the most common form of misconduct at issue during the last decade, provoked reversals or remands in 46% of the thirty-nine appeals. Overall, the most frequently litigated issue, lack of candor, was involved in fifty-two of ninety-four cases; in more than one-third (36%; 19/52) of these cases, applicants gained admittance or

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TABLE 5

REPORTED CASES INVOLVING MORAL CHARACTER 1931-1971

	Admitted ¹	Denied	Remanded	Highest Committee Result Reversed	Total Cases
Criminal Record	3	7	—	3	10
Felonies	1	2	—	1	3
Non-felonies	2	4	—	2	6
Unspecified	—	1	—	—	1
Additional factors involved	—	4	—	—	4
Rehabilitation discussed	3	—	—	3	—
Lack of Candor ²	9	20	2	9	31
Additional factors involved	5	15	—	6	20
Financial Irresponsibility	—	2	—	—	2
Personal obligations	—	2	—	—	2
Additional factors involved	—	2	—	—	2
Misuse of Legal Process	3	3	—	3	6
Lay participant	2	0	—	2	2
Unauthorized practice	1	3	—	1	4
Additional factors involved	2	2	—	2	4
Sexual Misconduct	1	—	—	1	1
Political Activity & Affiliation	3	6	—	4	9
Academic Misconduct	2	3	—	3	5
Other ³	3	4	—	3	7
Rehabilitation Discussed	6	—	1	6	7
TOTALS ⁴	16	26	2	17 ⁵	44

1. Remands with instruction to admit are coded as admitted.
2. Includes eight cases in which lack of candor was discovered after the applicant had been admitted. Five cases resulted in revocation and two in two-year suspensions (coded as denial); one resulted in admission.
3. Includes use of aliases, disregard for oath, false testimony, forged checks, and unspecified misconduct. Eleven additional cases in this period involved procedural or due process questions and are excluded from the categorical breakdowns.
4. Totals include cases involving more than one category of misconduct.
5. Includes two cases in which the highest committee approved, and the court denied, admission. Committee determinations were reversed or remanded in 43% (19/44) of all cases. Cases in which the procedural posture was unclear were treated as though the committee denied.

TABLE 6

REPORTED CASES INVOLVING MORAL CHARACTER 1972-1982

	Admitted	Denied	Remanded	Highest Committee Result Reversed	Total Cases
Criminal Record	13	12	2	12	27
Felonies	3	1	2	2	6
Non-felonies	3	3	—	2 ¹	6
Unspecified	7	8	—	8 ²	15
Additional factors involved	6	8	1	4	15
Rehabilitation discussed	8	5	2	8 ³	15
Lack of Candor	7	13	1	5	21
Additional factors involved	5	10	1	3	16
Financial Irresponsibility	2	8	—	2	10
Personal obligations	2	6	—	2	8
Professional obligations	—	2	—	—	2
Additional factors involved	2	6	—	2	8
Misuse of Legal Process	—	6	—	—	6
Lay participant	—	5	—	—	5
Unauthorized practice	—	1	—	—	1
Additional factors involved	—	4	—	—	4
Sexual Misconduct	1	—	—	1	1
Mental or Emotional Disorders	—	2	—	—	2
Political Activity & Affiliation	2	—	—	—	2
Academic Misconduct	—	2	—	—	2
Other ⁴	1	1	—	1	2
Rehabilitation Discussed	8	5	2	8 ³	15
TOTALS ⁵	19 ⁶	27 ⁶	3	18 ³	49
<p>1. Includes one case in which the highest committee approved and the court denied admission.</p> <p>2. Includes two cases in which the highest committee approved and the court denied admission.</p> <p>3. Includes three cases in which the highest committee approved and the court denied admission. Committee decisions were reversed or remanded in 43% (21/49) of all cases. Cases with unclear procedural posture coded as if highest committee denied.</p> <p>4. "Other" includes irresponsible conduct, unethical business practices, and lack of remorse.</p> <p>5. Totals include cases involving more than one category of misconduct. Six cases involving procedural and constitutional questions and three certified questions were not included in the categorical breakdowns.</p> <p>6. Includes one case in which the highest committee denied, and a lower court panel approved. Remands with instructions to admit were coded as admitted.</p>					

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remands. Candidates with the poorest chances of success were those with histories of financial irresponsibility (ten of twelve denied); of the more recent cases, misuse of legal processes created the greatest risk of exclusion (six of six denied).

With few exceptions, courts and committees have developed no categorical policies toward particular offenses. Although a few jurisdictions have formally stated or informally determined that certain conduct will not be a matter for concern (e.g., sexual relationships, a single misdemeanor marijuana charge, conduct “in the nature of horseplay”),¹⁸⁷ most examiners indicated that their decisions would depend on a broad range of factors, including the nature, number, and proximity of offenses, the applicant’s age when they were committed, and evidence of rehabilitation. But while agreeing on those common criteria, courts and committees have arrived at quite different conclusions regarding comparable attitudes and activities. The following analysis reviews the nature of bar oversight and the extent to which it advances the primary objective of certification—protecting the public. Whether certain forms of bar inquiry are consistent with other societal values will be the subject of Part IV.

b. *Criminal Conduct and Abuse of Legal Processes*

A threshold difficulty in applying character standards stems from the inclusiveness of “disrespect for law” as a ground for excluding applicants. The conventional view has been that certain illegal acts—regardless of the likelihood of their repetition in a lawyer-client relationship—evidence attitudes toward law that cannot be countenanced among its practitioners; to hold otherwise would demean the profession’s reputation and reduce the character requirement to a meaningless pretense. The difficulty, of course, is that this logic licenses inquiry into any illegal activity, no matter how remote or minor, and could justify excluding individuals convicted of any offense that affronted the sensibilities of a particular court or character committee. In fact, bar inquiry frequently extends to juvenile offenses and parking violations, and conduct warranting exclusion has been thought to include traffic convictions and cohabitation.¹⁸⁸

187. See RULES REGULATING ADMISSION TO PRACTICE LAW IN CALIFORNIA Rule X § 101 (a); RULES GOVERNING ADMISSION TO THE MISSISSIPPI STATE BAR Rule VIII § 6; Custer, *supra* note 120, at 19.

188. Only three jurisdictions specifically exclude juvenile offenses and 10% specifically include them; 16% inquire about parking violations. See Appendix I. In some New York districts, candidates with unpaid tickets will not be processed. See *N.Y. Comm. Rep.*, *supra* note 101, at 28; *In re Willis*, 288 N.C. 1, 215 S.E.2d 771, *appeal dismissed sub nom.* *Willis v. North Carolina State Bd. of Law Examiners*, 423 U.S. 976 (1975) (Board could legitimately conclude, in rejecting application, that driving while intoxicated and driving in violation of license restrictions evidenced moral turpitude); Raymond, *The Role of the Law School Respecting Character and Fitness*, 35 B. EXAMINER 3, 8 (1966) (traffic offenses possible ground for non-certification). Cohabitation cases are discussed *infra*

When disagreeing with board determinations, courts have occasionally stressed the need for some rational relationship between the conduct at issue and fitness to practice.¹⁸⁹ Yet those decisions do not renounce the standards that render such disputes inevitable. "Disrespect for law" as a criterion for exclusion necessarily yields highly idiosyncratic determinations of what acts are sufficiently damning to warrant non-certification. Violation of a fishing license statute ten years earlier was sufficient to cause one local Michigan committee to decline certification.¹⁹⁰ But, in the same state, at about the same time, other examiners on the central board admitted individuals convicted of child molesting and conspiring to bomb a public building.¹⁹¹

Decisions concerning drug and alcohol offenses have proven particularly inconsistent. Convictions for marijuana are taken seriously in some jurisdictions and overlooked in others; much may depend on whether the examiner has, as one put it, grown more "mellow" towards "kids smoking pot."¹⁹² According to its Executive Director, the Nevada Board of Examiners functions under "a double standard. . . . Board [members] say nothing about the guy who gets in brawls and fist fights in bars because they figure he's just a good ol' boy, . . . but the Board gets upset about drugs, even in small amounts."¹⁹³ So too, courts frequently have divided over drug and alcohol addiction: For some, it constitutes an adequate mitigating circumstance; for others it is an independent basis for denial.¹⁹⁴

pp. 578-80.

189. See *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447, 459-61, 421 P.2d 76, 83-85, 55 Cal. Rptr. 228, 237-39 (1966) (rational relationship necessary between requirement and ability to practice law); *Cord v. Gibb*, 219 Va. 1019, 1022, 254 S.E.2d 71, 73 (1979) (applicant could not be denied admission because of cohabitation; no rational relationship between that living status and requirement of good character).

190. Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983). The state board rejected the local committee's recommendation.

191. *Id.*

192. Interview, Sec., N.M. Bd. of B. Examiners. Compare Interview, Staff Member, Mich. Char. and Fitness Comm. (Aug. 30, 1982) (convictions for marijuana possession taken seriously) with Interview, Sec., Ark. Bd. of Law Examiners (Aug. 25, 1982) ("[I]f misdemeanor marijuana possessions were considered, hell, I'd be knocking out one-half the applicants. Well, that's an exaggeration, but [not much].") and Interview, Admin. Dir., Conn. Bd. of B. Examiners (Aug. 30, 1982) (noting liberalization of committee's attitude toward marijuana possession charges and convictions). Compare also *Application of Leff*, 127 Ariz. 62, 618 P.2d 232 (1980) (failure to report marijuana sales on income tax form and to admit sales to committee warranted denial of admission) with *In re Dileo*, 307 So. 2d 362 (La. 1975) (failure to pay transfer tax on marijuana inadequate basis for denial of admission).

193. Interview, Exec. Dir., Nev. St. B. (Aug. 16, 1982).

194. Compare *In re Application of A.T.*, 286 Md. 507, 408 A.2d 1023 (1979) (drug addiction treated as mitigating condition) with *In re Monaghan*, 122 Vt. 199, 167 A.2d 81 (1961) (alcoholism) and *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (driving while intoxicated), *appeal dismissed sub nom. Willis v. North Carolina State Bd. of Law Examiners*, 430 U.S. 976 (1975). Compare also *Barnes, supra* note 77, at 78 (suggesting that bar should not hold applicant to higher standard than it practices, and that "our profession is not exactly a dry profession") with *Green, Procedures for Character Investigations*, 35 B. EXAMINER 10, 13 (1966) (more than one drunk driving charge would probably prevent admission).

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Attitudes toward sexual conduct such as cohabitation or homosexuality reflect similar diversity. Some bar examiners do not regard that activity as “within their purview,” unless it becomes a “public nuisance” or results in criminal charges.¹⁹⁵ Thus, the Arizona committee does not “set itself up as a morals judge,” in part because “in this day and age living together. . . is accepted.”¹⁹⁶ In other jurisdictions, as discussion in Part VI reflects, cohabitation and homosexuality can trigger extensive inquiry and delay, and some slight possibility of denial.¹⁹⁷ In the remaining states, examiners reported few applications presenting evidence of “living in sin” or homosexuality. According to one Board of Bar Examiners president, “Thank God we don’t have much of that [in Missouri].”¹⁹⁸ How these individuals would view such conduct if brought to their attention remains unclear. Most invoked vague generalities about whether such non-traditional sexual activity would interfere with the individual’s fitness to practice and “ability to be an ethical lawyer,” or whether it would reflect a “contumacious attitude toward the law.”¹⁹⁹

Not only does the “disrespect for law” standard invite inconsistencies in application, it permits a hierarchy of concerns that are at best tenuously related to the primary justification for character review—protecting the public. It bears note that the conduct generating the greatest likelihood of investigation was unauthorized practice of law: Eighty-four percent of all jurisdictions would inquire into such activity, and it was the second most likely offense to preempt admission.²⁰⁰ Yet as some examiners implicitly acknowledged, such misconduct, by definition, could not recur after certification.²⁰¹ And it is doubtful that the general public would view most lay

195. Interview, Special Rep., Mo. B., 21st & 22d Dists. (June 20, 1983); Interview, Admin. Asst., Col. Bd. of Law Examiners (Oct. 14, 1982).

196. Interview, Sec., Ariz. Char. and Fitness Comm. (Aug. 17, 1982); Custer, *supra* note 120, at 20 (noting that, although fornication is misdemeanor in Georgia, Board does not inquire into “live-in” relationships). One New York interviewer who inquired too deeply into a domestic arrangement felt “I had trod on territory I shouldn’t have trod on.” Interview, Chairman, N.Y. Char. and Fitness Comm., 3d Dist. (June 10, 1983).

197. See *infra* pp. 578–82.

198. Interview, Pres., Mo. Bd. of B. Examiners (June 7, 1983).

199. Interview, Sec., Md. State Bd. of Law Examiners (Aug. 17, 1983); Interview, Chairman, Mo. Cir. B. Comm., 9th Dist. (June 14, 1983); Interview, Chairman, Va. Temporary Char. and Fitness Comm., 26th Dist. (June 21, 1983).

200. See Tables 4 & 5, *supra* pp. 534, 535. In Pennsylvania, unauthorized practice was one of two offenses that would prompt investigation, and many respondents indicated they might deny an applicant guilty of such conduct. Interview, Office Mgr., Pa. Bd. of Law Examiners (Oct. 19, 1982). See, e.g., Interview, Sec., N.Y. Char. Comm., 2d Dep’t (July 1983); Interview, Member, Ill. Char. and Fitness Comm., 3d Dist. (July 18, 1983); Interview, Chairman, N.C. Bd. of B. Examiners (July 8, 1983); Interview, Exec. Dir., Alaska St. B. (Oct. 5, 1982); Interview, Chairman, Nev. Bd. of Law Examiners (July 12, 1983).

201. Idaho committees would probably do nothing about unauthorized practice on the theory that “Hell, it’s about time [the applicant] got himself a license.” Interview, President-Elect, Idaho Bd. of Comm’rs (July 14, 1983); see also Interview, Chairman, Va. Temporary Char. and Fitness Comm., 26th Dist. (June 21, 1983) (relevant only as it “reflects an attitude toward the law”). Only if the

legal assistance as evidencing serious and generalizable moral deficiencies. Vast numbers of nonlawyers (most obviously accountants, bankers, real estate brokers, and insurance agents) routinely violate unauthorized practice statutes, as do attorneys who occasionally give legal advice outside the jurisdiction in which they are admitted.²⁰² On the rare occasions when consumers' views have been solicited, they have expressed overwhelming support for lay legal assistance.²⁰³ To the extent that character committees are simply shoring up unauthorized practice enforcement, their efforts are highly self-serving and of dubious societal value. Moreover, as subsequent discussion will suggest, it is equally doubtful that many of the other non-criminal matters with which decisionmakers have been concerned are either sufficiently predictive of subsequent professional conduct or sufficiently damning in the eyes of the public to justify the costs of moral scrutiny.

c. *Noncriminal Conduct*

Other major areas of concern to courts and bar committees have been psychological instability, financial irresponsibility, and radical political involvement, although again attitudes vary widely as to the significance of particular conduct. For example, as Appendix I indicates, the bar applications of some jurisdictions make no inquiries as to mental health; others require a psychiatrist's certificate and in some cases an examination for candidates who have a history of treatment.²⁰⁴ Applicants with "mental problems are usually denied" admission in Michigan, whereas Idaho would probably exclude only "a homicidal maniac or a schizo who loses touch for a week at a time."²⁰⁵ The few reported cases on point also reflect quite different perspectives. The Nevada Supreme Court does not consider mental illness a ground for denial, while Wyoming, Arizona, and Illinois have excluded applicants evidencing "religious fanaticism," personality disorders involving "hypersensitivity, unwarranted suspicion, and excessive self-importance," or a "propensity to unreasonably react" to perceived opposition.²⁰⁶

applicant had fraudulently misrepresented his status could analogous post-certification offenses occur.

202. See Rhode, *supra* note 93.

203. *Id.* at 3-4.

204. See MICHIGAN BOARD OF BAR EXAMINERS, GUIDELINES FOR LOCAL CHARACTER AND FITNESS COMMITTEES § 5 (1981) [hereinafter cited as MICHIGAN GUIDELINES]; *N.Y. Comm. Rep.*, *supra* note 101, at 23.

205. Interview, Member, Mich. Bd. of B. Examiners (July 9, 1983); Interview, President-Elect, Idaho Bd. of Comm'rs (July 17, 1983). Many applications do not request information regarding psychiatric treatment. See *infra* Appendix I.

206. Compare *In re* Petition of Schaengold, 83 Nev. 65, 422 P.2d 686 (1967) with Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 430 U.S. 907 (1977) and *In re* Martin-Trigona, 55 Ill. 2d 301, 302 N.E.2d 68 (1973), *cert. denied*, 417 U.S. 909 (1974).

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Financial mismanagement provokes comparable disagreement. Most jurisdictions (73%) make no inquiries concerning debts past due, while others demand detailed information ranging from parking fines to child support obligations.²⁰⁷ Two respondents would be opposed to admitting a “deadbeat” or someone with a “pattern” of bounced checks, and three respondents reported instances of denying or deferring such applicants.²⁰⁸ Other jurisdictions were far more tolerant. Idaho examiners see financial management problems so often that “we’re ignoring it. It’s so expensive to get through law school.”²⁰⁹ And, as the Administrative Director of the Connecticut Board of Bar Examiners observed, “after all, we all bounce a few checks once in a while.”²¹⁰

Attitudes toward bankruptcies also varied. Some respondents appeared to assume that applicants who “don’t have a conscience when it comes to paying their own bills . . . may not have a conscience when it comes to their fiduciary responsibilities to their clients.”²¹¹ Discharges to avoid student loans have resulted in denial in some jurisdictions.²¹² Yet about a third of all state bar applications made no inquiries in the area, and some examiners, particularly those who handle bankruptcies in private practice, felt that individuals had a right to such remedies: Exercise of this prerogative during periods of “tough going” was not an indication of character.²¹³ At most, these committee members would regard the applicant as guilty of

207. For a discussion of the range of inquiries, see *infra* pp. 576–77. Michigan suggests that its local committees may want to adjourn an interview and require the applicant to submit documentation that his or her child support payments are current. See MICHIGAN GUIDELINES, *supra* note 204, at § 4(K); see also *N.Y. Comm. Rep.*, *supra* note 101, at 23; *In re Beasley*, 243 Ga. 134, 136–37, 252 S.E.2d 615, 617 (1979) (failure to pay court-ordered child support on three occasions constituted grounds for denial).

208. Those jurisdictions opposed to admission included New York and Nevada. See Interview, Chairman, N.Y. Comm. on Char. and Fitness, 3d Dist. (June 10, 1983); Interview, Sec., N.Y. Char. and Fitness Comm., 2d Jud. Dep’t (July 1983) (reporting probable views of committees); Interview, Chairman, Nev. Bd. of Law Examiners (July 12, 1983). Arizona and Washington both reported that they would flag such applications. See Interview, Exec. Dir., Wash. St. B. (Aug. 23, 1982); Interview, Sec., Ariz. Char. and Fitness Comm. (Aug. 17, 1982). Oregon, New Jersey, and New York reported instances where applicants withdrew or were denied. See Interview, Exec. Dir., Or. Bd. of Bar Examiners (July 11, 1983); Interview, Chairman, N.J. Statewide Comm. on Char. (July 20, 1983); Interview, Chairman, N.Y. Char. and Fitness Comm., 8th Dist. (July 15, 1983). Since in Alabama bouncing checks could constitute a felony, the character committees would regard them with a “jaundiced eye”; such conduct reflects individuals’ “inability to be responsible in their own fiscal affairs—much less other peoples.” Interview, Chairman, S. Ala. Char. and Fitness Comm. (July 7, 1983).

209. Interview, President-elect, Idaho Bd. of Comm’rs (July 14, 1983).

210. Interview, Admin. Dir., Conn. Bd. of B. Examiners (Aug. 30, 1982).

211. Interview, Exec. Ass’t, Miss. Bd. of B. Admissions (Aug. 30, 1982); see also Pres., Mo. Bd. of B. Examiners (June 7, 1983) (bankruptcy “to avoid debts would be a problem”).

212. For examples of denials, see Interview, Chairman, N.J. Statewide Comm. on Char. (July 20, 1983); Interview, Office Mgr., Pa. Bd. of Law Examiners (Oct. 19, 1982); see also sources cited *infra* note 216.

213. Interview, Chairman, Me. Bd. of B. Examiners (Aug. 2, 1983); see Table 4, *supra* p. 534; Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983).

"poor financial planning or succumbing to the American way of life—buy, buy, buy and pay later."²¹⁴

For a final group of respondents, a candidate's individual circumstances would be controlling. Applicants who had not "abused" the system or sought "to avoid debts" would not be penalized.²¹⁵ What exactly would constitute "abuse," or what would motivate a bankruptcy apart from debt avoidance, was not apparent.

Judicial decisions regarding bankruptcy have yielded equally inconsistent results. For example, applicants who discharged student loans have been admitted or excluded depending on a highly selective assessment of whether "undue hardship" justified the default.²¹⁶ Not only does such an approach leave applicants in considerable uncertainty about the price of exercising federally protected rights, its public policy rationale is by no means self-evident. In what sense does pursuit of a lawful discharge on one's own behalf reflect an "[in]ability to perform the duties of a lawyer," if the same action, undertaken for a client, would be entirely consistent with the attorney's professional responsibility under prevailing ethical codes?²¹⁷

A third area in which the bar has shown interest is the ideology of its applicants. Religious fanatics, suspected subversives, and "rabble rousers" have been delayed, deterred, and occasionally excluded under both admission and disciplinary standards.²¹⁸ Although existing caselaw constrains states' ability to deny entry solely for political associations,²¹⁹ it has done little to curb investigation into political offenses. Responses to such activity are highly idiosyncratic. The Secretary of Arkansas' Board of Law Examiners "tend[s] to look at political dissent with a blink," while in other jurisdictions, such as Nevada, misdemeanor arrests arising out of protest

214. Interview, Exec. Sec., Wyo. State Bd. of B. Examiners (Aug. 23, 1982).

215. Interview, Chairman, Ala. Char. and Fitness Comm. (July 7, 1983); Interview, Pres., Mo. Bd. of B. Examiners (June 7, 1983).

216. In *Florida Bd. of Bar Examiners v. Groot*, 365 So. 2d 164 (Fla. 1978), the Court admitted an applicant who had discharged student loans because his support obligations to his children and ex-wife could appropriately take precedence over repayment of past debts. Yet that same court, the same year, denied another candidate who, while he lacked such family obligations, had other equitable factors in his favor. *Florida Bd. of Bar Examiners v. G.W.L.*, 364 So. 2d 454 (Fla. 1978). Whereas Groot had voluntarily left two jobs that would have enabled him to meet past as well as present obligations, G.W.L. had been unable to obtain employment. See Comment, *Good Model Character and Admission to the Bar: A Constitutionally Invalid Standard?*, 48 U. CIN. L. REV. 876, 876-77 (1979) (critiquing Florida decisions); see also *In re Gahan*, 279 N.W.2d 826 (Minn. 1979) (denying applicant who had discharged loans).

217. *In re Gahan*, 279 N.W.2d 826 (Minn. 1979); MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT DR-7-101; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2. That is not to imply endorsement of the bar's prevailing partisanship norms. See Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. (1985) (forthcoming); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30.

218. See *infra* notes 270 & 351-62 and accompanying text.

219. See *infra* notes 355-59 and accompanying text.

activity “would raise eyebrows,” and have caused some applicants to be “harried.”²²⁰ Any “disruptive” activity will trigger review in one Missouri district.²²¹ Yet in Idaho, it would take something akin to membership in the “Red Brigade” to arouse interest, and in some Virginia areas, even such associations would not be “any of [the committee’s] business.”²²² To the former Executive Secretary of Manhattan’s Character Committee, “sit-ins aren’t politics. They involve interfering with the government and breaking the law.”²²³ To the California Supreme Court, acts of civil disobedience may reflect the “highest moral courage.”²²⁴ So too, avoidance of military service would be received sympathetically in some jurisdictions and found disabling in others.²²⁵

The First Amendment implications of some of these cases will be addressed at greater length in Part VI. For present purposes, what bears emphasis is not only the inconsistent, subjective, and conclusory quality of decisionmaking, but also its attenuated relationship with the stated rationale for moral oversight. Denying or delaying admission is typically justified not in terms of the likely risk to the public, but rather by reference to vague generalities about respect for law. Yet in many instances, the appearance of such respect seems to assume greater significance than the values it is designed to reflect.

d. *Remorse, Rehabilitation, and Cooperation with the Committee*

A final context in which decisionmaking has proven particularly idiosyncratic involves candidates’ apparent attitudes toward their prior conduct and committee oversight. Arrogance, “argumentativeness,” “rudeness,” “excessive immatur[ity],” “lackadaisical” responses, or intimations that a candidate is “not interested in correcting himself” can significantly color character assessments.²²⁶

220. Interview, Sec., Ark. Bd. of Law Examiners (Aug. 25, 1982); Interview, Exec. Dir., Nev. St. B. (Aug. 16, 1983). Arrests for a nuclear protest would flag applications for review in Washington. See Interview, Exec. Dir., Wash. St. B. (Aug. 23, 1982).

221. Interview, Chairman, Mo. B. Comm., 9th Dist. (June 14, 1983).

222. Interview, President-Elect, Idaho Bd. of Comm’rs (July 14, 1983); Interview, Chairman, Va. Temporary Char. Comm., 4th Dist. (June 20, 1983).

223. Papke, *supra* note 86, at 19 (quoting Theodore Freschi).

224. Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 462, 421 P.2d 76, 87, 55 Cal. Rptr. 228, 239 (1966).

225. Compare Interview, Chairman, Me. Bd. of B. Examiners (Aug. 2, 1983), *quoted infra* p. 572 with *In re* Application of Brooks, 57 Wash. 2d 66, 355 P.2d 840 (1960), *cert. denied*, 365 U.S. 813 (1961).

226. Interview, Sec., N.Y. Char. Comm., 2d Jud. Dep’t (July 1983); Interview, Admin. Sec., Ala. Bd. of B. Examiners (Aug. 19, 1982).

Some members of the Illinois bar committee that denied George Anastaplo admission were troubled more by his seeming arrogance than his potential communist sympathies. By one interviewer’s account, Anastaplo was “‘trying to be a smart aleck’”; “[the bar has] too many lawyers already, we didn’t need a smart aleck.” Patner, *The Quest of George Anastaplo*, CHICAGO, Dec. 1982, 185, 189;

The ultimate sin in many jurisdictions is a failure to seem "up front" with the committee.²²⁷ Nondisclosure, even about relatively trivial matters, may evidence the wrong "mental attitude," and "glib, equivocal responses," even if technically accurate, may prove more damning than the conduct at issue.²²⁸ As Part VI reflects, those who have refused on principle to respond to questions regarding political associations have often paid a heavy professional price.²²⁹

In some, particularly criminal, cases, the applicant's efforts to atone for prior conduct are of equal concern. Tables 5 and 6 indicate that evidence of rehabilitation was explicitly discussed in about a quarter (24%) of the reported cases over the last half century and in over a majority (56%) of the criminal cases during the last decade. Yet what evidence will suffice to establish redemption varies considerably. Written testimonials and character witnesses are taken seriously in some cases and discounted in others; much may depend on the status of the reference as well as the biases of the decisionmaker.²³⁰ For the Georgia Board, evidence that the individual has "[led] a crime-free life, earning a living and supporting his family" will not suffice.²³¹ Rather, he must demonstrate that he has "become a useful and significant member of society by some positive action, hopefully for the betterment of both the applicant and his community."²³² Church and civic activities have not, however, always proved adequate. Thus, one former Florida felon, perhaps in an abundance of caution, atoned for sev-

see also Papke, *supra* note 86, at 18 (Anastaplo always conducted himself before committee as if he "was better than us"); Patner, *supra*, at 188 (quoting Sawyer: "[T]here was a feeling that George should have gotten down on his knees and asked to be admitted to the bar as if it were some kind of fraternity. George just would not kow tow.") (emphasis in original).

227. Interview, President-elect, Idaho Bd. of Comm'rs (July 14, 1983); see also Interview, Dir., Ga. B. Admissions (Aug. 25, 1982) ("Ninety percent of all the problems I've seen . . . would not have been problems if [the applicants] had only been honest on the application."); Interview, Chairman, N.C. Bd. of B. Examiners (July 8, 1983) ("lying to the Board . . . in itself can trigger denial").

228. Interview, Chairman, Ill. Char. and Fitness Comm., 1st Dist. (July 11, 1983) (commenting on applicant who lied about his residences and where he went to school); see *In re* Application of Schaeffer, 273 Or. 490, 541 P.2d 1400 (1975) (investigation warranted for failure to disclose charges of driving motor vehicle with suspended driver's license); Application of Stone, 74 Wyo. 389, 288 P.2d 767 (1955), *cert. denied*, 352 U.S. 815 (1956).

229. See *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (rejecting state bar's refusal to certify based on refusal to answer questions); *In re* Anastaplo, 3 Ill. 2d 471, 121 N.E.2d 826 (1954) (refusal to answer justifies refusal of certification), *appeal dismissed and cert. denied*, 348 U.S. 946 (1955); *infra* p. 567.

230. Compare *In re* Application of K.B., 291 Md. 170, 434 A.2d 541 (1981) (letters from attorneys and judges not sufficient for admission) with *In re* Petition of Waters, 84 Nev. 712, 447 P.2d 661 (1968) (letters from employers, professors, attorneys sufficient for admission); see *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966) (certifying applicant after receipt of recommendations from judges, professors, state assemblymen); *In re* Petition of Diez-Arguelles, 401 So. 2d 1347 (Fla. 1981) (admitting applicant upon character testimony by law school dean and others).

231. Custer, *supra* note 120, at 21.

232. *Id.*

eral years of imprisonment not only with testimonials and gainful employment, but also an LL.M. in taxation.²³³

Other courts and committees place a high premium on remorse. Invocations of a "higher personal ethic" or protestations of innocence are generally inadvisable.²³⁴ Accordingly, Michigan's bomber was admitted to the bar, despite several years in a maximum security facility, while North Carolina's unconfessed "peeping Tom" was thought too great a public threat to be certified.²³⁵ Applicants willing to denounce the "foolish, baseless hopes regarding the betterment of society" that impelled their youthful Communist Party affiliations are pronounced moral; those who refuse to renounce or explain their allegedly radical (though concededly nonsubversive) affiliations may be deemed unfit.²³⁶ Faced with one recalcitrant leftist in 1956, the Oregon Supreme Court denied admission on the ground that the candidate's positive depiction of the "world-wide conspiracy" called Communism constituted false testimony under oath.²³⁷

Not all decisionmakers are impressed, however, by candidates' good works or public *mea culpa*'s. One Florida applicant was commended for his insistence on innocence where confession would have been more expedient.²³⁸ Other courts and committees appear to assume that "a leopard never changes its spots";²³⁹ neither civic involvements nor "self-serving statements" of remorse will adequately atone for certain sins.²⁴⁰ But whichever position they adopt on this point, bar decisionmakers are all operating on one shared empirical premise. Their common assumption is that certain attitudes and actions are sufficiently predictive of subsequent

233. *In re* Petition of Diez-Arguelles, 401 So. 2d 1347 (Fla. 1981) (admitting candidate who obtained B.A., J.D. & LL.M. in taxation during the eight years following his conviction); *see also In re* Application of Davis, 38 Ohio St. 2d 273, 313 N.E.2d 363 (1974) (remanding case for further consideration where, after conviction, petitioner obtained graduate degree in public administration and financed legal education through work as research assistant).

234. *In re* Application of Easton, 289 Or. 99, 102, 610 P.2d 270, 271 (denying admission), *cert. denied*, 449 U.S. 862 (1980); *see also In re* Elkins, 308 N.C. 317, 328, 302 S.E.2d 215, 221 (protestations of innocence insufficient to show good moral character), *cert. denied*, 104 S. Ct. 490 (1983).

235. *Compare* Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983) with *In re* Elkins, 308 N.C. 317, 302 S.E.2d 215, *cert. denied*, 104 S. Ct. 490 (1983).

236. *Compare* *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 251 (1957) (Frankfurter, J., concurring) (inferences of "questionable character" from youthful Communist Party affiliation unwarranted) and *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (inferences of bad moral character from failure to answer questions about political affiliation unwarranted) with *In re* Anastaplo, 3 Ill. 2d 471, 121 N.E.2d 826 (1954) (refusal to answer questions about membership in Communist Party justifies denial of certification) and *Application of Patterson*, 210 Or. 495, 302 P.2d 227 (1956) (Communist Party membership grounds for denial), *vacated*, 353 U.S. 952 (1957) (per curiam).

237. *Application of Patterson*, 210 Or. 495, 302 P.2d 227, 237 (1956), *vacated*, 353 U.S. 952 (1957).

238. *Florida Bd. of Bar Examiners Re: L.K.D.*, 397 So. 2d 673, 676 (Fla. 1981).

239. *Application of Guberman*, 90 Ariz. 27, 30, 363 P.2d 617, 619 (1961) (rejecting committee's reasoning and ordering applicant admitted); *see also In re* Application of K.B., 291 Md. 170, 434 A.2d 541 (1981) (rejecting recommendation of board of examiners and denying admission).

240. Interview, Chairman, Mich. Char. and Fitness Comm. (July 8, 1983).

misconduct to justify the costs of certification procedures. Yet as the following sections suggest, that premise is empirically unsupported and flatly at odds with the disciplinary process as currently administered.

IV. THE DISCIPLINARY PROCESS

The inadequacies of bar disciplinary processes have been documented extensively elsewhere and need not be rehearsed at length here. However, some brief comparative observations are in order. In particular, the treatment of non-professional conduct, that is, conduct occurring outside an attorney-client relationship, warrants inquiry, since the justification for regulating the personal behavior of licensed attorneys is in many respects analogous to that underlying the certification process.

A. *The Double Standard of Denial and Disbarment*

The traditional rationale for disciplinary proceedings is not to punish, but "to ensure that the public, the courts, and the profession are protected against unsuitable legal practitioners."²⁴¹ As in admissions, the objective is to exclude those "unsafe . . . to manage the legal business of others,"²⁴² and to maintain public confidence in the "integrity and standing of the bar."²⁴³ Under this framework, personal activities that might subject the profession to public "derision and distrust" are appropriate grounds for disciplinary intervention.²⁴⁴

From the standpoint of maximizing public protection and confidence, the rationale for moral oversight is much more compelling for those already admitted to the bar than for those seeking admission. Acts committed by an individual obligated to function as an officer of the court are surely more probative of future conduct in that office than conduct occurring prior to the point of licensure. Of course, from a more parochial perspective, it is true that practicing attorneys have a greater vested interest in their professional license than applicants to the bar. But the time, money, and energy that candidates invest in legal education are hardly insubstantial.²⁴⁵ And, as a policy matter, the self-interest of incumbents

241. *In re Higbie*, 6 Cal. 3d 562, 570, 493 P.2d 97, 101, 99 Cal. Rptr. 865, 869 (1972).

242. *Ex Parte Wall*, 107 U.S. 265, 307 (1883); *see also In re Draper*, 317 A.2d 106 (Del. 1974); *Florida Bar v. Riccardi*, 264 So. 2d 5 (Fla. 1972); *In re Kirtz*, 494 S.W.2d 324 (Mo. 1973); *In re MacLeod*, 479 S.W.2d 443 (Mo.), *cert. denied*, 409 U.S. 979 (1972).

243. Mass., S.J.C. Rule 4:01 § 18(4), 213 Mass. 3A (1974); *see also Bryant v. State Bar*, 21 Cal. 2d 285, 131 P.2d 523 (1942); *In re Florida Bar*, 301 So. 2d 448 (Fla. 1974); *State v. Bieber*, 121 Kan. 536, 247 P. 875 (1926); *In re Titus*, 21 N.Y.S. 724 (N.Y. Sup. Ct. 1892); *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (1956).

244. *In re Goldstein*, 411 Ill. 360, 367, 104 N.E.2d 227, 230 (1952); *see Ex Parte Wall*, 107 U.S. 265 (1883); *In re Higbie*, 6 Cal. 3d 562, 493 P.2d 97, 99 Cal. Rptr. 865 (1972).

245. *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447, 452 n.3, 421 P.2d 76, 80 n.3, 55 Cal. Rptr. 228, 232 n.3 (1966); A.B.A. REPORT OF THE ADVISORY AND EDITORIAL COMMITTEE ON

Moral Character as Professional Credential

does not justify a less rigorous moral standard for those granted a public trust than for those who seek it.

Yet the bar's administration of admission and disciplinary processes has yielded precisely such a double standard; both substantive and procedural requirements are more solicitous of practitioners than applicants. In admission proceedings, the applicant has the burden of establishing good moral character, frequently under circumstances lacking formal due process safeguards.²⁴⁶ By contrast, in disciplinary proceedings, the bar must establish unfitness to practice, generally in accordance with more stringent procedural mandates.²⁴⁷

So too, as courts have frequently noted, the scope of moral inquiry is broader for applicants than incumbents.²⁴⁸ Substantive standards generally restrict disbarment proceedings to specific acts of moral turpitude, whereas certification investigation may extend to general character traits inferred from far more venial sins.²⁴⁹ Except in the most egregious cases, the bar has always been disinclined to cast out a colleague for abuses within a lawyer-client relationship. Every major analysis of the disciplinary structures has found them grossly insensitive both to serious professional misconduct and to garden variety problems of delay, neglect, incompetence and overcharging.²⁵⁰ Surveys of bar procedures in major states reveal that some 90% of complaints are dismissed without investigation, and national statistics reflect that of grievances falling within disciplinary jurisdiction, less than 3% result in public sanctions and only .8% in dis-

BAR EXAMINATIONS AND ADMISSIONS TO PRACTICE LAW 145 (1951).

246. See *supra* p. 507 and *infra* p. 575.

247. See Note, "Good Moral Character" as a Prerequisite to Admission to the Bar: Inferences to be Drawn from Past Acts and Prior Membership in the Communist Party, 65 YALE L.J. 873, 874 & nn. 5 & 6 (1956) and cases cited therein. Compare procedures discussed *supra* pp. 505-07, 513-19 with A.B.A. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (adopted Feb. 1979, as amended through 1983).

248. But see Note, *Admission to the Bar Following Conviction for Refusal of Induction*, 78 YALE L.J. 1352, 1385 n.166 (1969) (admission and disbarment standards of moral character are "distinction without a difference").

249. See Note, *supra* note 247, at 873-74 & nn. 3 & 4. Compare admission cases discussed *supra*, notes 190-203, 208-15, 220-25 and accompanying text, and *infra*, notes 351-55, 407-15 and accompanying text, with those discussed in text accompanying Table 7, *infra* p. 549-50.

250. See A.B.A. SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1-2 (1970); Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 723-36 (1981); Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B.F. RESEARCH J. 919, 993-99.

barment.²⁵¹ Even repeated instances of neglect, misrepresentation, and incompetence will rarely provoke license revocation.²⁵²

Oversight of prominent attorneys has been particularly myopic. A sample of 1981-82 cases involving public discipline (disbarment, suspension, and reprovls) in three jurisdictions that routinely publish such information (California, Illinois, and the District of Columbia) revealed that over 80% of those for whom data were available were solo practitioners.²⁵³ To be sure, such figures do not of themselves confirm differential treatment of elite and non-elite offenders. Given the differences in temptations and pressures between solo and large firm practice, it is quite plausible that elite attorneys are much less likely to commit the abuses that trigger serious sanctions.²⁵⁴ Yet the definition of which offenses warrant such sanctions may suggest some bias; disciplinary agencies rarely pursue the kinds of misconduct occurring in large firm practice, such as dilatory tactics, harassment, and suppression of evidence.²⁵⁵ Even in instances of notorious misconduct, elite attorneys have retained their licenses. Richard Kleindienst, who committed perjury during his confirmation hearings as Attorney General, received a thirty-day suspension.²⁵⁶ A Wall Street senior partner who lied under oath to conceal discoverable documents was never

251. Steele & Nimmer, *supra* note 250, at 982 (statistics on dismissals without investigation); see also Marks & Catchcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 ILL. L.F. 193, 217. The public sanctions and disbarment figures were computed from available state statistics compiled in STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND THE AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, STATISTICAL REPORT RE: EXPENSE, CASE VOLUME, AND STAFFING OF LAWYER DISCIPLINARY ENFORCEMENT IN STATE JURISDICTIONS DURING 1982 (1983); STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND THE AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, STATISTICAL REPORT RE: PUBLIC DISCIPLINE OF LAWYERS BY DISCIPLINARY AGENCIES 1978-1982 (1983). These reports are available in ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM (Final Supp. 1984).

The public sanction figure (2.7%) reflects the total number of cases in which public sanctions were instituted (943) divided by the total number of complaints (which, if true, would constitute misconduct) recorded against attorneys (34,667) in the District of Columbia and the 41 states for which both figures are available. The disbarment figure (.8%) was calculated by dividing the total number of disbarments plus disbarments by consent (285) by the volume of complaints for the same states. New York data do not include figures for the 1st Judicial Department (Manhattan and the Bronx).

And, of course, complaints to bar agencies represent only a tiny fraction of actual abuses. As numerous studies reflect, clients and practitioners are rarely inclined to report abuses, grievances, or misconduct. See Steele & Nimmer, *supra* note 250, at 957-60.

252. See sources cited *supra* note 250; cases cited in the bar journals identified *infra* note 253; see also cases in CALIFORNIA ST. B., July 1984, at 64 and *infra* note 450.

253. The survey covered October 1981-December 1982 and relied on cases cited in CALIFORNIA LAWYER, Vol. 1, Nos. 2-4; Vol. 2, Nos. 1-11 (1981-82); DISTRICT LAWYER, Vol. 6, Nos. 1-6; Vol. 7, Nos. 1-2 (1982-83); and ILLINOIS B.J., Vol. 70, Nos. 2-12; Vol. 71, Nos. 1-4 (1982).

254. See J. CARLIN, *LAWYERS ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966); J. HANDLER, *THE LAWYER AND THE COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* 127 (1967).

255. See Rhode, *supra* note 217, and sources cited *supra* notes 251 & 253.

256. District of Columbia Bar v. Kleindienst, 345 A.2d 146 (D.C. 1975).

disbarred, and the list of less celebrated examples is easily expanded.²⁵⁷ Such cases make a mockery of current certification procedures; the bar denies, delays, or deters applicants with peccadilloes on the theory that they *might* commit serious professional abuses, while those who do commit such abuses escape meaningful sanctions.

Moreover, available empirical data suggest that offenses not involving activity as a lawyer rarely result in loss of a license. Except in the few states that automatically decertify attorneys convicted of a felony, nonprofessional misconduct typically accounts for only less than 4% of all disbarments, suspensions and resignations.²⁵⁸ A review of reported judicial decisions between 1967 and 1981 reveals only 107 cases imposing disbarment for offenses not involving performance as a lawyer. And as Table 7 indicates, almost all such misconduct (94%) concerned felonies. A similar profile emerges from the sample of 1981–82 cases noted above. Criminal convictions included tax evasion, mail fraud, racketeering, bribery, forgery, perjury, burglary, narcotics violations, rape, and sodomy.²⁵⁹ Offenses for which applicants are delayed or denied admission—traffic violations, bankruptcy, nonpayment of debts, failure to answer questions regarding radical political involvement, personality disorders, consensual sexual activity, and petty drug violations—almost never have comparable repercussions for practitioners.²⁶⁰

The disparity between entry and exclusionary standards raises a number of awkward questions about the current scope of certification procedures. If certain nonprofessional conduct is sufficiently probative to withhold a license, why is it not also grounds for license revocation? As long as bar members are unwilling to monitor their colleagues' parking violations, psychiatric treatment, and alimony payments, what justifies their reliance on such evidence in screening applicants? Insofar as the profession is truly committed to public- rather than self-protection, the incongruity between disciplinary and certification procedures is untenable.

257. J. STEWART, *THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS* 364 (1983); see also P. STERN, *LAWYERS ON TRIAL* 89 (1980) ("Lawyers whose political views and types of practice are out of the mainstream of the profession are favorite targets of bar disciplinary actions."); Garbus & Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in *VERDICTS ON LAWYERS* 47, 57 (R. Nader & M. Green eds. 1976) (disciplinary oversight group must be able to scrutinize more complex transactions of attorneys).

258. Steele & Nimmer, *supra* note 250, at 995.

259. See *supra* note 253.

260. See Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489, 493 (1958). For example, compare *In re Higbie*, 6 Cal. 3d 562, 493 P.2d 97, 99 Cal. Rptr. 865 (1972) (failure to pay marijuana transfer tax warranted one year actual suspension not disbarment), with decisions discussed *supra* note 192. Admission cases involving bankruptcy and financial history are discussed *infra* pp. 576–77, and those concerning homosexuality are discussed *infra* pp. 580–81. Contemporary cases reveal no disbarments for bankruptcy or cohabitation, and only one for homosexual activity with a consenting adult. See Table 7.

That is not, however, to imply that stricter proctoring of nonprofessional offenses by practitioners would be desirable. To the contrary, the bar's past involvement in such moral oversight has little to commend it.

TABLE 7

DISBARMENT OF ATTORNEYS FOR NON-PROFESSIONAL ACTIVITIES
1976-1981 (N=108)

MAJOR OFFENSES	New York	Other Jurisdictions	Total
Larceny, Receipt of			
Stolen Property	19%	11%	17%
Controlled Substances	10%	25%	15%
Embezzlement, Theft by			
Deception, Fraud (non-tax)	17%	8%	14%
Securities Violations	18%	3%	13%
Tax Fraud or Evasion	10%	8%	9%
Perjury/False Statements	8%	8%	8%
Violent Crime (assault, murder, accessory to murder)	1%	8%	9%
Criminal Contempt	6%	0%	4%
Sexual Misconduct (e.g. promoting prostitution, sexual abuse of children)	0%	8%	3%
Burglary (or conspiracy to break and enter)	0%	6%	2%
Other ¹	11%	14%	12%
Felonies	97%	89% ²	94%
Non-felonies ³	3%	11% ⁴	6%
Non-criminal Factors ⁵ discussed	0%	11%	4%

1. Includes obstruction of justice, illegal gambling, bribery, forgery, price-fixing, conspiracy, extortion, passing counterfeit bills, bail jumping, and illicit motor vehicle sales.
2. Includes *In re Goldman*, 124 Ariz. 105, 602 P. 2d 486 (1979) (proof but not conviction of 4 types of felonious conduct).
3. Includes delivery of marijuana, violation of federal securities laws, attempted felonies, theft, and theft by deception.
4. Includes Committee on Prof. Ethics & Conduct v. Littlefield, 244 N.W.2d 824 (Iowa 1976) (misdemeanor conviction based on felony attempt); Committee on Prof. Ethics & Conduct v. Hanson, 244 N.W.2d 822 (Iowa 1976) (misdemeanor conviction based on felony charge).
5. Includes alcoholism, rehabilitation, unauthorized practice in violation of parole, professional financial misconduct.

B. *The Undisciplined Scope of Professional Discipline*

On the whole, bar assessments of moral character have proven as subjective and inconsistent in the context of nonprofessional discipline as in admissions. In part, the difficulty stems from the inherent indeterminacy of standards. Relevant considerations typically include subjective assessments regarding not only the culpability of the offender but also the reputation of the profession.²⁶¹ Although some states mandate disbarment for certain specified offenses, not all misconduct falls in that category.²⁶² And since disbarment is not necessarily permanent, disputes regarding the gravity of the offense and the rehabilitation of the offender will often arise in reinstatement hearings.²⁶³ Moreover, in most jurisdictions, conduct is considered disabling only if it involves "moral turpitude," a standard open to competing interpretations.

For the past century, the Supreme Court has declined to review disbarments for nonprofessional misconduct, and its pronouncements in related contexts have done little to define the relevant inquiry.²⁶⁴ As judges have frequently observed in cases involving the moral turpitude of aliens, the standard defies principled application. To Justice Jackson, a formulation that permits decisions to turn on the reactions of "particular judges to particular offenses" necessarily invites clichés and caprice.²⁶⁵ Alternatively, if, as Learned Hand believed, the decisionmaker's duty is "to divine what 'common conscience' prevalent at the time demands," the task becomes "impossible in practice."²⁶⁶ Even assuming such judicial prescience,

261. See, e.g., *In re Lamberis*, 93 Ill. 2d 222, 227, 443 N.E.2d 549, 551 (1982).

262. See, e.g., *In re Goldman*, 124 Ariz. 105, 108, 602 P.2d 486, 489 (1979) (mandatory disbarment upon conviction of any felony); *Kentucky Bar Ass'n v. Pope*, 549 S.W.2d 296 (Ky. 1976) (conviction of felonies relating to evasion of taxes warrants disbarment); CAL. BUS. & PROF. CODE §§ 6101-6102 (West 1974) (conviction of crimes results in suspension and disbarment); N.Y. JUD. LAW § 90(4) (McKinney 1968 & Supp. 1982-83) (all felonies).

263. See *In re Hiss*, 368 Mass. 447, 452 n.9, 333 N.E.2d 429, 433 n.9 (1975). At least one of the attorneys involved in Watergate has subsequently been reinstated. See Morrison, *The Lawyers of Watergate*, Nat'l. L.J., June 21, 1982, at 43, col. 1. To be reinstated, attorneys petition the court that disbarred them, and typically provide evidence regarding their subsequent rehabilitation.

264. In *Barsky v. Board of Regents*, 347 U.S. 442 (1954), a divided Court upheld suspension of a physician who had been convicted of failing to produce papers subpoenaed by the House Un-American Activities Committee. Whether *Barsky* remains valid precedent is doubtful since the breadth of discretion accorded to state licensing activities is difficult to reconcile with the analysis in subsequent bar admission cases. See *infra* pp. 571-72; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-14, at 951-53 (1978).

265. *Jordan v. DeGeorge*, 341 U.S. 223, 239 (1951) (Jackson, J., dissenting). As Justice Jackson also noted, "If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral." *Id.* at 234 (footnotes omitted).

266. *Johnson v. United States*, 186 F.2d 588, 590 (2d Cir. 1951); see also *Repouille v. United States*, 165 F.2d 152, 154-55 (2d Cir. 1947) (Frank, J., dissenting) (judge has only vague notions of contemporary public opinion). For an interesting analysis of those cases, see E. CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* 300-09 (1955); Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838, 841-51 (1951).

it is by no means clear that popular prejudice is an appropriate disciplinary criterion for a profession charged with defending the unpopular.

For purposes of bar discipline, the "moral turpitude" criterion does nothing to refine inquiry, but merely removes it one step from its announced concern—fitness for legal practice. Unsurprisingly, analysis has been conclusory and outcomes inconsistent. Indeed, many of the leading definitions border on tautology. Thus, the California Supreme Court has declared: "To hold that an act of a practitioner constitutes moral turpitude is to characterize him as unsuitable to practice law."²⁶⁷ Other courts have often simply pronounced, *ex cathedra*, their assessment of the conduct at issue, and comparable abuses have provoked divergent responses within and across jurisdictions.

During the early part of this century, alcohol cases proved especially problematic. Habitual drunkards and home brewers fared differently in different courts.²⁶⁸ Marijuana offenses provide the modern analogue, and while the trend is clearly toward tolerance, a few judges have stoutly resisted the tide of permissiveness.²⁶⁹

Political nonconformity and income tax violations have been equally divisive. The ebb and flow of chauvinist sentiment has led to inconsistent sanctions for allegedly subversive practitioners.²⁷⁰ State courts are currently split as to whether willful evasion of taxes or failure to file a return constitutes moral turpitude.²⁷¹ Even within the same jurisdiction, local disciplinary committees have different views of comparable cases. The Boston bar has taken tax violations seriously, and recommended disbarment or suspension, while in some of the surrounding counties, failure to

267. *In re Higbie*, 6 Cal. 3d 562, 570, 493 P.2d 97, 101-02, 99 Cal. Rptr. 865, 869-70 (1972).

268. *Compare* *Bartos v. United States District Court*, 19 F.2d 722, 724 (8th Cir. 1927) (manufacturing 700 quarts of beer for home use not moral turpitude) *with* *Rudolph v. United States*, 6 F.2d 487, 488 (D.C. Cir.) (possession and transportation of alcohol is crime involving moral turpitude warranting discontinuance of retired policeman's pension), *cert. denied*, 269 U.S. 559 (1925) *and* *State v. Bieber*, 121 Kan. 536, 542-43, 247 P. 875, 878 (1926) (attorney possessing liquor disbarred for misdemeanor involving moral turpitude).

269. For one of the rare recent instances of disbarment for a marijuana violation, see *In re Moore*, 453 N.E.2d 971 (Ind. 1983).

270. *Compare* *In re Burch*, 73 Ohio App. 97, 103, 54 N.E.2d 803, 806 (1943) (no disbarment for political offense) *and* *In re Clifton*, 33 Idaho 614, 623, 196 P. 670, 673 (1921) (no disbarment for unpatriotic statement) *and* *Lotto v. State*, 208 S.W. 563, 563-64 (Tex. Civ. App. 1919) (statement that "Germany is going to win the war and I hope she will" held not ground for disbarment) *with* *In re Smith*, 133 Wash. 145, 153, 233 P. 288, 291 (1925) (disbarment for advocating syndicalism under auspices of I.W.W.) *and* *Margolis' Case*, 269 Pa. 206, 210-12, 112 A. 478, 480 (1921) (disbarment for advocating anarchism and avoiding draft) *and* *In re Arctander*, 110 Wash. 296, 306, 188 P. 380, 383 (1920) (disbarment for assisting aliens to avoid military service by withdrawing citizenship application).

271. See cases cited in *In re Fahey*, 8 Cal. 3d 842, 852-53 & nn.7-10, 505 P.2d 1369, 1375, 106 Cal. Rptr. 313, 319 (1973); see also Selinger & Schoen, "To Purify the Bar": A Constitutional Approach to Non-Professional Misconduct, 5 NAT. RESOURCES J. 299, 355-57 (1965); Comment, 1972 *Pennsylvania Supreme Court Rules of Disciplinary Enforcement: Relieving the Uncertainties of Marginal Attorney Crimes*, 79 DICK. L. REV. 588, 611-12 (1975).

file a return may be perceived as “a brave act of citizen’s defiance against an oppressive government.”²⁷²

Throughout the century, promiscuity has been a perennial concern, though the focus of inquiry has shifted somewhat. Early twentieth century cases centered on prostitution and fornication, and generated a set of somewhat murky moral mandates. Commercial relationships with fallen women were permissible to a point; those who paid money for sexual favors were often forgiven, while those who accepted money for abetting such activities were purged from the profession.²⁷³ Singled out for particular condemnation was a black attorney who managed a house of ill repute where “white girls . . . consorted with negroes” and smoked opium.²⁷⁴ To a 1929 Missouri court, seduction by an unfulfilled promise to marry constituted “baseness and depravity” mandating disbarment.²⁷⁵ By contrast, in the preceding year, New Jersey justices found fornication with a fifteen-year-old to warrant only a six-month suspension, in light of the victim’s previously dissolute life and the attorney’s reputation as an “up-right and moral man.”²⁷⁶ Seducing one’s secretary was discreditable but not disabling; seducing the wife of a war hero was unforgivable.²⁷⁷ While sexual advances toward the secretary were dismissed as part of the “weaknesses, passions and frailties possessed in some degree by all mankind,”²⁷⁸ the adulterous liaison with a prominent society matron (notwithstanding its subsequent legitimation through marriage) constituted an act of “inherent baseness without alleviation or excuse.”²⁷⁹

Although current definitions of deviance are less inclusive, more recent cases still reflect a broad spectrum of views. Embracing and fondling an incarcerated client shocked the sensibilities of Idaho’s 1979 disciplinary committee.²⁸⁰ Carnal indecency with children has met with mixed results:

272. J. BARTLETT, *THE LAW BUSINESS: A TIRED MONOPOLY* 59–60 (1982).

273. *Compare* *People ex rel Black v. Smith*, 290 Ill. 241, 124 N.E. 807 (1919) (that attorney visited disorderly houses does not, by itself, warrant disbarment) *with In re Kosher*, 61 Wash. 2d 206, 209, 377 P.2d 988, 990 (1963) (attorney’s participation in operation of brothel grounds for disbarment) *and In re Okin*, 272 A.D. 607, 73 N.Y.S.2d 861 (N.Y. App. 1947) (same) *and In re Wilson*, 76 Ariz. 49, 51–54, 258 P.2d 433, 435–37 (1953) (receipt of protection money from prostitute grounds for disbarment).

274. *In re Marsh*, 42 Utah 186, 188, 129 P. 411, 412 (1913).

275. *In re Wallace*, 323 Mo. 203, 206, 19 S.W.2d 625, 625 (1929).

276. *In re Isserman*, 6 N.J. Misc. 146, 148, 140 A. 253, 253 (1928). The court in *Isserman* also noted that the woman looked older than her age. *Id.*

277. *Compare* *State v. Byrnett*, 3 Ohio N.P. 28 (1896) (seducing secretary held not grounds for disbarment) *with* *Grievance Comm. v. Broder*, 112 Conn. 263, 274–78, 152 A. 292, 294–95 (1930) (seducing war hero’s wife held grounds for disbarment).

278. *State v. Byrnett*, 3 Ohio N.P. 28, 36 (1896).

279. *Grievance Comm. v. Broder*, 112 Conn. 269, 275, 152 A. 292, 294 (1930); *see also In re Titus*, 21 N.Y.S. 724, 727–29 (N.Y. Sup. Ct. 1892) (attorney disbarred for, inter alia, adultery).

280. *Committee on Professional Ethics v. Durham*, 279 N.W.2d 280 (Iowa 1979). Although the state bar committee recommended a one year suspension from practice, the Supreme Court imposed only a reprimand in light of the isolated nature of the attorney’s “indiscretion.” *Id.* at 286.

Some courts have viewed it as a sickness warranting temporary suspension, others as a sign of irredeemable depravity.²⁸¹ The relationship between abusive acts and legal practice is rarely of itself controlling. Thus, although a Florida lawyer lost his license following a conviction for indecent exposure in a public lavatory, an Indiana practitioner received only a year suspension for making sexual advances to one client and offering to exchange his legal services for nude photographs of another client and her daughter; only the latter attorney's activities were deemed "personal and unrelated" to professional practice.²⁸²

One of the more consistent predictors of disbarment has been public notoriety. Exclusion from the profession has resulted even from unintentional offenses when adverse publicity is sufficiently intense. Accordingly, a negligent Massachusetts nightclub owner and New Mexico drunk driver both lost their license in the aftermath of highly publicized accidents.²⁸³ In those and other instances, judicial assessment seemed colored as much by the celebrity as the nature of the acts or their relevance to future professional performance.²⁸⁴ Yet, as post-Watergate disciplinary cases reflected, not even notoriety is a wholly reliable predictive device. Although most of the attorneys involved in criminal conduct lost their licenses at least temporarily, the District of Columbia Court of Appeals justified leniency toward former Attorney General Kleindienst in part on the theory that he had suffered enough through public opprobrium.²⁸⁵

Whether any of these cases is an appropriate subject for bar oversight will receive more extended analysis in Parts VI and VII. For present purposes, the point is simply that the disciplinary process, as currently administered, is not only irreconcilable with the assumptions of entry-level certification, but unlikely to yield principled application. Moreover, insofar as both admissions and disciplinary procedures are intended to maximize public protection rather than professional status, their inadequacies lie deeper. The central premise of moral oversight—that courts and com-

281. Compare *In re Safran*, 18 Cal. 3d 134, 136, 554 P.2d 329, 330, 133 Cal. Rptr. 9, 10 (1976) (three-year suspension) and *State v. Fleckenstein*, 60 N.J. Super. 399, 159 A.2d 411 (suspension), certif. dismissed, 33 N.J. 109, 162 A.2d 338 (1960) with *In re McDonald*, 269 S.C. 598, 599, 239 S.E.2d 83, 83 (1977) (disbarment).

282. Compare *Florida Bar v. Kay*, 232 So. 2d 378, 379, (Fla.) (disbarment), cert. denied, 400 U.S. 956 (1970) with *In re Wood*, 265 Ind. 616, 624, 358 N.E.2d 128, 133 (1976) (one year suspension).

283. *In re Welansky*, 319 Mass. 205, 65 N.E.2d 202 (1946); *In re Morris*, 74 N.M. 679, 397 P.2d 475 (1965); see Note, *supra* note 260, at 493-94.

284. For a discussion of the effect of public notoriety, see H. DRINKER, *supra* note 23, at 44-46; Selinger & Schoen, *supra* note 271, at 309, 347-51; see also *Grievance Comm. v. Broder*, 112 Conn. 269, 278, 152 A. 292, 295 (1930) (public notoriety makes court's duty "doubly imperative").

285. See *District of Columbia Bar v. Kleindienst*, 345 A.2d 146 (D.C. 1975); Morrison, *supra* note 263, at 44.

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mittees can predict future misconduct from the prior offenses generally at issue in character proceedings—bears closer scrutiny.

V. THE PREDICTIVE POWER OF PRIOR CONDUCT

A. *Perceptions of the Process*

Most bar examiners involved in the certification process express confidence in its general effectiveness. About 60% (40/66) of respondents engaged in initial character screening in all fifty states identified no problems in the current system. Over half (8/15) of the chairmen at the highest review level in selected jurisdictions found the process effective; a quarter were unsure, but only fourteen percent believed that it was ineffective.

In amplifying those assessments, a few individuals expressed serious misgivings. Several were concerned about the subjectivity of standards or inconsistencies in their application, and one was troubled by the disparity between disciplinary and admissions criteria.²⁸⁶ The head of Maine's Board of Examiners doubted that screening was "valid in terms of some statistical sense" and the president-elect of Idaho's Board of Commissioners felt it accomplished "[z]ip; we do it because it is required by statute."²⁸⁷ But most examiners were far more positive, and some gave glowing testimonials: The Illinois system was deemed "95% effective" and West Virginia's was "as near perfect as you can get."²⁸⁸ According to the secretary of the Arkansas Board of Examiners, since "lawyers evaluate other individuals such as witnesses, jurors, clients and adversaries on a consistent basis, . . . we [attorneys] are the only ones who can make moral determinations of our fellow men. After all, we know better than anyone else if someone is lying."²⁸⁹ Much of the bar's published commentary has been equally Panglossian; Georgia's system has had "virtually no

286. Interview, Chairman, Va. Temporary Char. and Fitness Comm., 26th Dist. (June 21, 1983) (subjectivity of standards); Interview, Chairman, Me. Bd. of B. Examiners (Aug. 2, 1983) (same); Interview, Exec. Dir., Alaska B. (Oct. 5, 1982) (concern for disparity between disciplinary and admissions criteria).

287. Interview, Chairman, Me. Bd. of B. Examiners (Aug. 2, 1983); Interview, President-Elect, Idaho Bd. of Comm'rs (July 14, 1983); *see also* Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983) ("There's no way I can believe [the process is] effective 100% or even close to it."); Interview, Member, Ill. Char. and Fitness Comm., 3d Dist. (July 13, 1983) ("It's pretty easy for a person to pull the wool over our eyes.").

288. Interview, Chairman, Ill. Char. and Fitness Comm., 1st Dist. (July 11, 1983); Interview, Pres., W. Va. Bd. of B. Examiners (July 8, 1983); *see also* Interview, Chairman, N.J. Statewide Comm. on Char. (July 20, 1983) ("statistically [the process] comes out pretty well"); Interview, Ass't to Dir., Or. Bd. of B. Examiners (Oct. 18, 1982) ("very effective system in which we care about applicants").

289. Interview, Sec., Ark. Bd. of Law Examiners (Aug. 25, 1982).

problems" and Pennsylvania has been thought never to have wrongfully excluded any applicant.²⁹⁰

Despite most bar examiners' confidence in their predictive capacities, there have been no attempts, however primitive, to assess the effectiveness of certification procedures. Not only is there an absence of controlled research, no state bar has examined the records of disciplined or disbarred attorneys to determine what, if anything, in their records as applicants might have foreshadowed later problems.²⁹¹ Nor have any studies attempted to examine the careers of candidates denied admission for evidence of subsequent moral lapses. Finally, and perhaps most disturbingly, the courts and examiners involved in certification have failed to confront the large volume of social science research that questions both the consistency and predictability of moral behavior.

As the preceding discussion makes apparent, the public protection rationale for certifying applicants rests on two central premises. The first is that the character required for practice is a consistent attribute: One has it or one does not. A second, equally critical assumption is that bar examiners can assess individual morality and fitness based on discrete prior acts with sufficient accuracy to justify the costs of exclusionary procedures. Both assumptions merit further empirical examination.

B. *The Inconsistencies of Moral Behavior*

Moral character is commonly assumed to be a function of consistent personality traits. As David Rosenhan observes, "we expect people to practice what they preach" and to behave consistently across various situations.²⁹² Thus, bar examiners presume that those who evidence lack of candor or disrespect for law in one context will do so in another, and that individuals who publicly acknowledge the wrongfulness of prior conduct are less likely to commit subsequent offenses.

Such assumptions about character have a firm historical grounding and considerable intuitive appeal. Moral and religious philosophers since Aris-

290. Hill, *Appellate Review of Moral Character and Fitness Determinations*, 51 B. EXAMINER, Aug. 1982, at 22, 24; Littleton, *Registration at Beginning of Law Study and Character Examination*, 23 B. EXAMINER 44, 49 (1954) (Member, Pa. Bd. of Examiners doubting that "we ever keep anybody out that should have been let in").

291. A committee of the ABA's section of Legal Education and Admissions recommended such a hindsight study as a partial alternative to the "sheer guesswork" now characterizing bar predictive processes. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 A.B.A. J. 815, 815-16 (1972) (quoting ABA Committee). Of course, even if such studies were to reveal that all past offenders possessed certain characteristics, it would not follow that most of those who possessed such attributes would become offenders. *Id.* at 816. Examining the subsequent record of excluded applicants might prove equally inconclusive. Even if most had no reported misconduct in other vocations, that would not definitely demonstrate how they would perform in legal practice.

292. Rosenhan, *Moral Character*, 27 STAN. L. REV. 925, 925 (1975).

tole have presupposed the existence of determinate character traits, leading to virtuous and nonvirtuous behavior.²⁹³ Much of the early work in psychological theory began from the premise that fundamental personality dispositions governed social conduct.²⁹⁴ And the perception that ethical behavior is consistent reinforces individuals' sense of predictability and control in making a vast range of legal and factual judgments.²⁹⁵ Nonetheless, contemporary social science research suggests that these assumptions are to some extent "a figment of our aspirations."²⁹⁶ In this, as in other contexts involving character evidence, many of our central behavioral premises lack firm empirical foundations.²⁹⁷

Over the past half century, a vast array of social science research has failed to find evidence of consistent character traits. Hartshorn and May's seminal *Studies in the Nature of Character* found so little relationship among conduct reflecting children's honesty, integrity, and self-control that the authors concluded that moral behavior was more a function of specific habits and contexts than of any general attributes.²⁹⁸ Lying and cheating were essentially uncorrelated, and even the slightest change in situational variables dramatically altered tendencies toward deceit; one could not predict cheaters in one class on the basis of cheating in another.²⁹⁹ While subsequent studies have not been entirely conclusive, most have yielded similar results; their findings suggest that the person with a

293. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS*, Book 2, §§ 5–6. For discussion of the diversity in definitions of virtue, see, e.g., A. MACINTYRE, *AFTER VIRTUE* (1981); M. OSSOWSKA, *SOCIAL DETERMINANTS OF MORAL IDEAS* (1970); J. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

294. See G. ALLPORT, *PERSONALITY: A PSYCHOLOGICAL INTERPRETATION* 286 (1937).

295. See E. JONES & R. NISBETT, *THE ACTOR AND OBSERVER: DIVERGENT PERCEPTIONS OF THE CAUSES OF BEHAVIOR* (1971); see also R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 31 (1980) (suggesting that such dispositional theories are shared by almost everyone socialized in western culture). Also, since individuals perceive others in limited roles, evidence that refutes a presumed consistency in behavior is rare.

296. Rosenhan, *supra* note 292, at 926; accord W. MISCHEL, *PERSONALITY AND ASSESSMENT* 23–26 (1968).

297. Suppositions about the credibility of character evidence are open to many of the same criticisms developed in this section. See Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758, 776 (1975) (context of trial situation influences jurors' perceptions of character of accused); Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984).

298. 1 H. HARTSHORN & M. MAY, *STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT* Book 1, 377–90, 407–12; Book 2, 211–43 (1928); 3 H. HARTSHORNE, M. MAY & F. SHUTTLEWORTH, *STUDIES IN THE NATURE OF CHARACTER: STUDIES IN THE ORGANIZATION OF CHARACTER* 153–212 (1930).

299. 1 H. HARTSHORN & M. MAY, *supra* note 298, at 211–21 (Book II). For discussion of Hartshorn and May's findings, see, e.g., W. MISCHEL, *supra* note 296, at 25–26; Bem & Allen, *On Predicting Some of the People Some of the Time: The Search for Cross-Situational Consistencies in Behavior*, 81 PSYCHOLOGICAL REV. 506, 506–07 (1974); Rosenhan, *supra* note 292, at 926. A partial revisionist interpretation of Hartshorn and May's data appears in Burton, *Generality of Honesty Reconsidered*, 70 PSYCHOLOGICAL REV. 481 (1963).

"truly generalized conscience . . . is a statistical rarity."³⁰⁰ Although individuals clearly differ in their responses to temptation, contextual pressures have a substantial effect on moral conduct independent of any generalized predisposition.³⁰¹ In some studies, even "seemingly trivial situational differences may reduce [behavioral] correlations to zero."³⁰²

The potency of contextual factors has been reflected in a wide variety of social science research. Taken together, the discomfiting import of these studies is that many individuals will, under some circumstances, violate those norms with which the bar is primarily concerned: honesty, integrity, remorse for prior offenses, and respect for the rights of others. For example, large percentages of individuals will cheat or steal in the face of opportunities to gain with little risk of loss, and will refuse to admit their misconduct.³⁰³ Exposures to stress, strong competition, authority, or peer influence can readily alter patterns of moral behavior.³⁰⁴ To cite only the most notorious example, more than sixty percent of the subjects in Stanley Milgram's obedience experiment complied with directions to administer apparently dangerous electric shocks to co-participants, despite their cries of pain.³⁰⁵

Although empirical evidence on lawyers' ethics is fragmentary, it also suggests that situational pressures play a critical role in shaping normative

300. W. MISCHEL, *supra* note 296, at 26.

301. Burton, *Honesty and Dishonesty*, in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES* 173, 176 (T. Lickona ed. 1976) [hereinafter cited as *MORAL DEVELOPMENT*]; see D. CRESSEY, *OTHER PEOPLE'S MONEY* 142-43 (1973) (finding no unusual personality traits in embezzlers); Burton, *supra* note 299.

302. W. MISCHEL, *supra* note 296, at 177.

303. See L. NETTLER, *LYING, CHEATING AND STEALING* 75 (1982); Fischer, *Levels of Cheating Under Conditions of Informative Appeal to Honesty, Public Affirmation of Value, and Threats of Punishment*, 64 J. EDUC. RESEARCH 12, 14 (1970); Hetherington & Feldman, *College Cheating as a Function of Subject and Situational Variables*, 55 J. EDUC. PSYCHOLOGY 212, 214 (1964); Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in *HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH* 347, 395 (D. Goslin ed. 1969); McQueen, *Examination Deception as a Function of Residual, Background, and Immediate Stimulus Factors*, 25 J. PERSONALITY 643, 650 (1957); cf. D. CRESSEY, *supra* note 301, at 140-42 (describing importance of situational rather than attitudinal factors in influencing embezzlers).

304. See, e.g., J. ARONFREED, *CONDUCT AND CONSCIENCE: THE SOCIALIZATION OF INTERNALIZED CONTROL OVER BEHAVIOR* 30-31, 40, 263 (1968) (citing studies); Bettelheim, *Individual and Mass Behavior in Extreme Situations*, 38 J. ABNORMAL & SOC. PSYCHOLOGY 417 (1943); Kelman, *Compliance, Identification, and Internalization: Three Processes of Attitude Change*, in *BASIC STUDIES IN SOCIAL PSYCHOLOGY* 140, 148 (H. Proshansky & B. Seidenberger eds. 1965); Zimbardo, *Involvement and Communication Discrepancy as Determinants of Opinion Conformity*, 60 J. ABNORMAL & SOC. PSYCHOLOGY 86 (1960); see generally Rosenhan, Moore & Underwood, *The Social Psychology of Moral Behavior*, in *MORAL DEVELOPMENT*, *supra* note 301, at 241 (situational characteristics are powerful determinants of moral behavior); sources cited *infra* note 305 (experiments demonstrating that stress and authority alter behavior patterns).

305. S. MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 35 (1974); Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOLOGY 371 (1963); see also Orne & Evans, *Social Control in the Psychological Experiment: Antisocial Behavior and Hypnosis*, 1 J. PERSONALITY & SOC. PSYCHOLOGY 189, 194-95 (1965) (finding participants willing to throw nitric acid in face of assistant).

commitments and conduct. As Jerome Carlin's study of the Manhattan bar and Joel Handler's research on small town practitioners make clear, an attorney's willingness to violate legal or professional rules depends heavily on the exposures to temptation, client pressures, and collegial attitudes in his practice setting.³⁰⁶

C. *Problems of Prediction*

The situational nature of moral conduct makes predictions of behavior uncertain under any circumstances, and the context of bar decisionmaking presents particular difficulties. A threshold problem springs from the inherent limitations of clinical predictive techniques, i.e., those based on non-statistical information. Even trained psychiatrists, psychologists, and mental health workers have been notably unsuccessful in projecting future deviance, dishonesty, or other misconduct on the basis of similar prior acts.³⁰⁷ For example, even in extreme cases, the best clinical research suggests that such professionals will err in two out of three predictions of violent behavior among institutionalized mental patients.³⁰⁸ There are no systematic data from which to predict white-collar offenses.³⁰⁹ And with respect to certain other forms of conduct that bar examiners find troubling, such as homosexual activity, the correlations between prior conduct and subsequent psychopathologies or nonconsensual sexual abuse are non-existent or too insubstantial to permit reasonably accurate prognosis.³¹⁰

Efforts to project psychological instability in individual cases have proven equally problematic. Trained specialists will frequently disagree about an appropriate diagnosis, the forms of behavior that will significantly impair legal practice, and the likelihood that they will recur in a particular case.³¹¹ At best, with respect to some chronic problems, such as

306. J. CARLIN, *supra* note 254, at 166-67; J. HANDLER, *supra* note 254, at 155.

307. See J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (1981) (U.S. Dep't of Health and Human Services Monograph); C. NETTER, *RESPONDING TO CRIME* 88-92 (1982); American Psychological Association, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099, 1110 (1978); sources cited *infra* note 314.

308. See also Kaslow, *Moral, Emotional, and Physical Fitness for the Bar: "Pondering (Seeming) Imponderables,"* B. EXAMINER, Aug. 1982, at 38, 41 (mental health professionals cannot always agree on diagnosis); Monahan, *Prediction of Crime and Recidivism*, 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1170, 1174-75 (1981) (reviewing studies).

309. Most of the published research has focused on identifying situational variables that may help in detecting or minimizing such offenses, see D. CRESSEY, *supra* note 301, at 153-54; L. NETTLER, *supra* note 303.

310. R. MITCHELL, *THE HOMOSEXUAL AND THE LAW* 12 (1969) (sexual violence); Clark, *Homosexuality and Psychopathology in Nonpatient Males*, 35 AM. J. PSYCHOANALYSIS 163, 167 (1975) (properly controlled studies uniformly yield "convincing evidence that homosexuality is not a criterion predictor of psychopathology"). The statistically slight link between child abuse and homosexual preference cannot justify broad preemptive screening measures. See, e.g., D. WEST, *HOMOSEXUALITY* 117-19 (1968).

311. Custer, *supra* note 120, at 17, 20; Kaslow, *supra* note 308, at 41.

alcohol abuse, predictions of aggregate recurrence rates may be fairly accurate, but the probability of determining which specific individuals will have future difficulties remains quite low.³¹² Given these indeterminacies, together with many medical health professionals' disinclination to prejudice patients who have sought their assistance, it is implausible to expect conclusive assessments in any but the clearest cases of incapacity.³¹³ It is doubtful that many individuals fitting that diagnosis are capable of successfully completing law school, passing a bar exam, and establishing a practice in which unsuspecting clients or colleagues will be at risk.

Despite most bar examiners' confidence in their intuitive capabilities, there is reason to doubt they will achieve substantially greater accuracy than trained clinicians in predicting future misconduct or incapacity. Not only do examiners and judges generally lack clinical expertise, they are dealing with highly circumscribed data. Decisionmakers are frequently drawing inferences about how individuals will cope with the pressures and temptations of uncertain future practice contexts based on one or two prior acts committed under vastly different circumstances. Yet, as just noted, a half century of behavioral research underscores the variability and contextual nature of moral behavior: A single incident or small number of acts committed in dissimilar social settings affords no basis for reliable generalization.³¹⁴ Neither common sense nor common experience suggest that those who have violated drug laws or avoided military service are likely to commit professional abuses, or that applicants who on occasion have mismanaged their own financial affairs are destined to become comminglers.³¹⁵ Indeed, if we cannot with reasonable accuracy predict cheaters in French from cheaters in math, it is difficult to entertain the far more attenuated inferences implicit in much bar decisionmaking.

It is equally problematic to assume, as do most courts and commentators, that individuals willing to acknowledge the error of prior misconduct are less likely to stray from the path of righteousness in the future. Despite our historic faith in the confessional, current research reflects that individuals' resistance to temptation and remorse for past transgressions are "completely independent or at best minimally interrelated."³¹⁶ None-

312. See Kaslow, *supra* note 308, at 44.

313. Interview with Jack Zusman, Dir., Fla. Mental Health Inst. (Mar. 2, 1984).

314. Bem & Allen, *supra* note 299; Burton, *supra* note 301, at 193. Even the most sophisticated nonclinical predictive techniques have proven highly inadequate for identifying future criminal offenders unless they have high rates of recidivism. See Note, *Selective Incapacitation: Reducing Crime through Predictions of Recidivism*, 96 HARV. L. REV. 511, 518 (1982) and sources cited therein.

315. But see Barnes, *supra* note 77, at 71, 78 (applicant with bad credit history might be tempted to appropriate client's money); *supra* pp. 541-43.

316. W. MISCHEL, *supra* note 296, at 26; see Becker, *Consequences of Different Kinds of Parental Discipline*, in 1 REVIEW OF CHILD DEVELOPMENT RESEARCH 169 (M. Hoffman & L. Hoffman eds. 1964); Hoffman, *Child Rearing Practices and Moral Development: Generalizations from Empir-*

theless, under contemporary procedures, a candidate's inclination and ability to stage a convincing *mea culpa* are frequently controlling.³¹⁷

As these examples suggest, bar decisionmaking is constrained not only by limitations of data but also by biases in evaluation. Character predictions relying on intuitive judgments have repeatedly proved less accurate than those based on statistical correlations;³¹⁸ human inferences are subject to seemingly infinite and inescapable forms of distortion. To cite only the most well-documented illustrations, individuals frequently make character assessments based on stereotyped notions about particular social groups, forms of conduct, or the relationship between certain personality traits.³¹⁹ Thus, for example, teachers' predictions of student honesty have been shown to correlate with grades, IQ, and social class.³²⁰

Nor do bar examiners appear exempt from such tendencies. Applicants' law schools, law firm affiliations, and domestic living arrangements frequently have affected character predictions, and examiners' own prejudices about drugs, alcohol, sex, psychiatry, and redemption inevitably will bias their perceptions.³²¹ Moreover, once individuals have formed a judgment, they tend selectively to assimilate information that will confirm their original impression. Conflicting data are undervalued, and certain vivid personal information is overvalued.³²² In general, individuals tend to give greater weight to evidence of unfavorable personal attributes than to positive ones, and to assess other individuals on the basis of one salient quality.³²³

Thus, the inherent limitations in predicting moral behavior, coupled with the subjectivity of bar standards, leave substantial room for error.

ical Research, 34 CHILD DEV. 295 (1963) The evaluation of our "singularly confessing society," and the role of ritualized admissions in ostensibly evoking truth are traced in M. FOUCAULT, THE HISTORY OF SEXUALITY 58-65 (R. Hurley trans. 1978).

317. See *supra* pp. 546-47.

318. P. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE (1954); R. NISBETT & L. ROSS, *supra* note 295, at 140-41; Dawes, *The Robust Beauty of Improper Linear Models in Decision Making*, 34 AM. PSYCHOLOGIST 571, 573 (1979); see also Burton, *supra* note 301, at 183 (single most consistent measure of cheating is father's occupation). I do not mean to imply that statistical correlations would provide a preferable means of evaluating applicants. See *supra* note 291.

319. G. ALLPORT, *supra* note 294, at 499-509; R. NISBETT & L. ROSS, *supra* note 295, at 141-92 (citing and discussing studies); Bem & Allen, *supra* note 299, at 508 (citing studies); Kahneman & Tversky, *On the Psychology of Prediction*, 80 PSYCHOLOGICAL REV. 237 (1973); Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

320. See Burton, *supra* note 301, at 182, and studies cited therein.

321. See *supra* pp. 538-41.

322. R. NISBETT & L. ROSS, *supra* note 295, at 167-92; sources cited *supra* note 319; Lord, Ross & Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 2098-99 (1979).

323. See G. ALLPORT, *supra* note 294, at 520-21; Hamilton & Huffman, *Generality of Impression-Formation Processes for Evaluative and Nonevaluative Judgments*, 20 J. PERSONALITY & SOC. PSYCHOLOGY 200, 201, 204 (1971); Weinstein & Crowds, *The Effects of Positive and Negative Information on Person Perception*, 21 HUM. REL. 383 (1968).

Those errors run in two directions: False positives result when applicants are deterred or denied on the belief that they will commit future abuses and they do not; false negatives occur when individuals are admitted on the belief that they will not engage in abusive conduct and they do. Studies of bar disciplinary processes confirm the frequency of errors of the latter sort.³²⁴ And the structural features of current admission processes—limitations of timing, investigatory resources and predictive capacity—make such inaccuracies inevitable.

The number of false positives is obviously lower, given the infrequency of formal denials of admission. Nonetheless, the cumulative impact of law school and bar screening, coupled with its deterrent potential, is not insubstantial. As Alan Dershowitz has demonstrated, even if bar examiners achieve far greater predictive accuracy than trained clinicians, the absolute number of wrongful exclusions spread over a period of years would remain quite significant.³²⁵ And, certainly, there are enough celebrated examples of dubious character determinations to give one pause. Individuals denied by some state bars on political grounds have nonetheless managed to achieve distinguished legal careers elsewhere, and one recent candidate whose "paranoid personality" allegedly disabled him from practice in Arizona succeeded not only in immediately securing admission elsewhere, but also in orchestrating the only antitrust challenge to bar licensing authority ever to reach the Supreme Court.³²⁶

Of course, to acknowledge the inadequacy of predictive techniques is not to indict their use in all contexts. The issue is always the costs of error and of the plausible alternatives. In certain occupational contexts involving health and safety, our tolerance for erroneous exclusions generally increases. For purposes of bar certification, however, where the consequences of granting a license are less likely to be irreparable, the argument for broad prophylactic screening becomes correspondingly less compelling. To evaluate the merits of that argument, we need a fuller analysis of the price of prediction and the availability of alternatives.

324. See, e.g., studies cited *supra* note 250 and *infra* note 449 (documenting abuses of lawyer-client relationship).

325. Dershowitz, *supra* note 291.

326. For example, George Anastaplo, who was denied admission for failure to disclose his political associations, became a highly respected scholar on constitutional history. See Patner, *supra* note 226, at 230, and discussion *infra* p. 567. Clyde Summers, who was excluded because his conscientious objector status restricted his ability to support the U.S. Constitution, see discussion *infra* p. 567, is a member in good standing of the New York bar and a distinguished labor law professor at the University of Pennsylvania. Robert Cover, one of the plaintiffs in *Law Students Research Council v. Wadmond*, discussed *infra* pp. 567-69, is the Chancellor Kent Professor of Law and Legal History at Yale Law School. For discussion of the Arizona application, see Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 430 U.S. 907 (1977); Ronwin v. State Bar of Arizona, 686 F.2d 692 (1981), *rev'd sub nom.* Hoover v. Ronwin, 104 S. Ct. 1989 (1984).

VI. THE COSTS OF MORAL OVERSIGHT

A. *The Misdirection of Resources*

Taken as a whole, the current certification process is an extraordinarily expensive means of providing a dubious level of public protection. Although it proved impossible to obtain reliable measures of state bar outlays, many jurisdictions expend substantial amounts of paid and volunteer time in screening routine applications which present no serious character questions.³²⁷ With respect to other applicants, courts and committees have often invested significant resources pursuing matters of marginal predictive value and significance.

According to the national Bar Examiners' Handbook, the most time-consuming investigations historically have been those where the applicant's "ideological holdings are in question."³²⁸ As an example, the Handbook recounts one case in which inquiry centered not on the applicant's political philosophy, but rather on his assertion that no family member had ever been associated with the Communist Party. To evaluate this contention, examiners found it "necessary" to conduct an exhaustive review of state records and newspaper archives in a jurisdiction that the family had left some fifteen years prior to the filing of the application. Although "for many weeks [the task] looked hopeless," committee members managed ultimately to brand the candidate's father as a *bona fide* party organizer.³²⁹ Nor was the scope of inquiry in that proceeding unique, as the records in other protracted political cases demonstrate.³³⁰ During the late 1960's and early 1970's, investigations of campus activists consumed substantial public and private resources. One prominent antiwar organizer submitted to eight prolonged hearings, spanning fourteen months, before finally gaining admission.³³¹

Such delays are by no means confined to political inquiries. For example, New York examiners have been known "to defer decision endlessly, until the applicant withdraws or abandons his application."³³² This strategy has the administrative advantage of avoiding direct confrontation with the candidate, the possibility of reversal on appeal, and tedious paperwork.³³³ Although meaningful statistics on the length of the review process proved unavailable, only five states (14%, N=36) reported formal time limits on screening. In some jurisdictions, an application may not

327. See *supra* p. 513.

328. BAR EXAMINERS' HANDBOOK, *supra* note 2, at 93.

329. *Id.*

330. See, e.g., cases discussed at note 326 *supra* and note 334 *infra*.

331. See Papke, *supra* note 86, at 21.

332. N.Y. Comm. Rep., *supra* note 101, at 27.

333. *Id.*

reach the final level of administrative review for two years; adjudicated proceedings have ranged from two and a half months to over a decade.³³⁴ Taken together, the anxiety, stigma, and financial expenses resulting from such protracted inquiries can be substantial.

Of equal concern is the amount of state and applicant resources consumed by routine as well as problem cases. For the vast majority of candidates, the certification process is a highly burdensome mechanism for identifying the tiny number of individuals with serious offenses. As subsequent discussion and Appendix 1 reflect, state bar applications generally demand an extended array of personal information and supplemental documentary submissions. Every jurisdiction requests extensive information about prior residences. A quarter demand a ten-year itinerary, which for many law school graduates will commence at age fourteen or earlier.³³⁵ A substantial number of applications require employment histories for comparable periods and accounts of all, or all but the most minor traffic violations.³³⁶ A minority of states also require photographs (25%), birth certificates (6%), physicians' certificates (4%), law school applications (2%), and high school grade transcripts (2%). Yet, given the limitations of staff and resources described earlier, little of this material is ever verified.³³⁷ Thus, as the Report evaluating New York's certification process noted, "after an applicant has performed the laborious task of assembling detailed information about his past, virtually no effort is made to do anything with that information," apart from a check of local law enforcement records.³³⁸

Almost all states require personal references of varying form and number, often exceeding three or more individuals from each locality in which the applicant has lived.³³⁹ Such requirements generate an enormous paper flow, which is time consuming for all concerned and ill-designed to gener-

334. Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983) (2 years). Other jurisdictions are far more efficient. *Compare* Application of Kiser, 107 Ariz. 326, 487 P.2d 393 (1971) (3 months) and Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964) (5 months) with Willner v. Committee on Character, 373 U.S. 96 (1963) (27 years) and *In re Anastaplo*, 366 U.S. 82 (1961) (11 years) and Application of Kellar, 81 Nev. 240, 401 P.2d 616 (1965) (5 years).

335. Another quarter specify all residences since ages ranging from 12 to 17, a requirement particularly onerous for applicants entering law as a second career.

336. Over a quarter (27%) of all states ask for all employers since age 16, and 8% ask for an account of all activities since age 18. Sixteen percent of bar applications ask about all traffic violations. Although over half the states (59%) disclaim interest in minor violations, the definition of minor is not necessarily expansive or unambiguous. For example, 18% exclude all or "occasional" parking violations and 6% exclude only non-moving violations which resulted in a penalty under \$25.00.

337. Efforts at confirmation are usually limited to a check of local police and motor vehicle records and some employers; half the states do not even routinely make these efforts. *See supra* pp. 513-14.

338. *N.Y. Comm. Rep.*, *supra* note 101, at 26.

339. Of the nine states requiring three references from each locality, six jurisdictions demand an additional two recommendations and references, and one application requires another five. According to interviews with bar administrators, the average number of references solicited is five; the range is between zero and eighteen.

ate useful information. As the former National Secretary of the Board of Examiners once acknowledged, these references “usually mean[] little as it is a man of indeed poor character and few friends who cannot get signatures for such a purpose.”³⁴⁰ Moreover, all but a few jurisdictions compound the absurdity by allowing applicants to collect and submit completed reference forms.³⁴¹ Presumably, the “man of indeed poor character” will engage in his own screening prior to submission.

A minority of states impose further, largely formalistic requirements open to a comparable critique. About a quarter of the states ask if the applicant will comply with the Code of Professional Responsibility, a question that one character oversight committee has characterized as tantamount to “asking a child whether he intends to be good for all time.”³⁴² Another eleven states inquire if the applicant has read the Code without asking whether he will comply, while three states ask about compliance but not about familiarity with the document. To obtain a handwriting sample, North Carolina has applicants explain why they desire to practice in the state.³⁴³ Maryland demands a short essay on one Canon of Ethics that the candidate thinks is important for the profession.³⁴⁴ Defenders of the requirement, while conceding that it seems “sort of juvenile in a way,” nonetheless maintain that “sometimes [examiners] can tell from that very selection what kind of a man you are dealing with.”³⁴⁵

A similar justification has been advanced for mandatory applicant interviews, and with equally dubious empirical grounding.³⁴⁶ Each year, over 11,000 individuals—more than a quarter of those admitted to practice—submit to character interviews.³⁴⁷ Conventional explanations for the interview process—that it provides a significant ceremonial rite and an opportunity for seasoned guidance by elder statesmen—are belied by the cursory and frequently pontifical nature of the interchange. Particularly in less urban areas, applicants may be required to travel substantial distances at inconvenient times in order to confirm their residency or make small talk about life as a lawyer.³⁴⁸ It is doubtful that the New York candidates who have traveled three and a half hours in order to engage in

340. Shafroth, *supra* note 116, at 202. The limited utility of references is discussed *supra* p. 514.

341. In 21 states, the applicant submits recommendations with his application. Only three jurisdictions request separate letters. In four states, it is unclear who sends in the forms.

342. *N.Y. Comm. Rep.*, *supra* note 101, at 67.

343. *BAR EXAMINERS' HANDBOOK*, *supra* note 2, at 161–62.

344. Barnes, *supra* note 77, at 79.

345. *Id.*

346. *See supra* pp. 514–15.

347. That figure is based on the number of applicants subject to character review in the twelve states that require interviews. *See supra* notes 68 & 102. Since not all Illinois districts require interviews and Virginia requires them only for graduates of out-of-state schools, appropriate adjustments were made in the statistics for those jurisdictions.

348. *See supra* pp. 514–15 (discussing interview format and focus).

a two-minute colloquy emerge with greater appreciation of their professional responsibilities.³⁴⁹ If, as one New York Committee Chairman maintained, the interview's function is to provide some applicants' "closest contact with an active member of the practicing bar,"³⁵⁰ that is more an indictment of current legal education than a justification for a largely vacuous initiation rite.

Moreover, assessments of current certification expenditures cannot proceed in a vacuum. A critical question, to which discussion in Part VII will return, is whether resources now directed toward predicting future misconduct would be better expended in identifying and responding to the abuses that actually occur. The merits of that alternative focus must also be evaluated in light of certain other costs of moral oversight. To the extent that prevailing certification procedures legitimate the bar's regulatory autonomy or deflect attention from its sorry record in policing practitioners, the system ill serves its primary prophylactic objectives. And insofar as pursuit of those objectives compromises fundamental constitutional values, its necessity warrants reexamination.

B. *First Amendment Concerns*

Throughout this century, the moral character requirement has placed a price on nonconformist political commitments. Conscientious objectors, religious "fanatics," suspected subversives, and student radicals have been exhaustively investigated, frequently delayed, and occasionally denied admission.³⁵¹ Unsurprisingly, the intensity and focus of inquiry has shifted with the national mood, with greatest concern surfacing in the 1950's. During the Cold War era, committees routinely grilled candidates about radical views or associations, including, in some instances, affiliation with allegedly "pinkish" organizations such as Americans for Democratic Action.³⁵² Recurrent questions were whether the applicant believed Communists were eligible to practice law or whether he had ever read *Das Kapital* outside of school. An affirmative response to the first inquiry was likely to result in protracted scrutiny, while confessions of intellectual curiosity met with mixed results. The extracurricular reader might be ex-

349. Baris, *supra* note 84, at 15, col. 4.

350. Interview, Sec., N.Y. Char. Comm., 2d Jud. Dep't (July 1983).

351. *In re Anastaplo*, 366 U.S. 82 (1961) (refusal to discuss possible Communist Party membership); Application of Patterson, 210 Or. 495, 302 P.2d 227 (1956) (belief in positive attributes of Communism), *vacated*, 353 U.S. 952 (1957); Application of Cassidy, 268 A.D. 282, 51 N.Y.S.2d 202 (N.Y. App. Div. 1944) (member of Christian Front Organization), *aff'd*, 296 N.Y. 926, 73 N.E.2d 41 (1947); Application of Stone, 74 Wyo. 389, 398, 288 P.2d 767, 771 (1955) (religious fanaticism), *cert. denied*, 352 U.S. 815 (1956); Green, *Procedures for Character Investigations*, 35 B. EXAMINER 10, 11 (1966) (rabble rouser ultimately allowed to take bar examination on split decision).

352. Brown & Fassett, *supra* note 116, at 494.

haustively examined for sympathies with the heretical work, or alternatively "commended for acquainting himself with the Communist menace."³⁵³ Other committees have intermittently monitored the content of applicants' political speeches and solicited views on subjects such as God, pacifists, the Marshall Plan, and campus activism.³⁵⁴

Such interrogations prompted a series of Supreme Court decisions that, although delimiting to some extent the ideological grounds justifying non-certification, still leave substantial scope for bar inquiry.³⁵⁵ Political activity culminating in arrest or academic discipline remains a legitimate concern, since it could evidence disrespect for law.³⁵⁶ And political beliefs may prompt denial for candidates who are unwilling to uphold the Constitution or who have knowingly joined organizations advocating violent overthrow of the government coupled with intent to do so.³⁵⁷ Accordingly, Illinois examiners could exclude conscientious objector Clyde Summers for failure to support a state constitutional provision requiring service in the state militia.³⁵⁸ Also subject to exclusion are those who refuse on principle to answer questions regarding radical political involvement, though the precise bounds of legitimate inquiry remain murky. Nothing in the Court's most recent pronouncements repudiates earlier decisions denying admission to George Anastaplo and Ralph Konigsberg for failure to supply information on Communist Party membership, even though such membership could not of itself have justified denial.³⁵⁹

As Appendix 1 reflects, political involvement is of continuing concern to many examiners. About a quarter of all state bar applications (24%) ask

353. *Id.*

354. *In re Anastaplo*, 366 U.S. 82, 85 n.5 (1961) (questions regarding God), *discussed in* Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 *LAW IN TRANSITION* 155, 187-88 (1961) (question regarding God withdrawn after protest); Papke, *supra* note 86, at 17 (discussing Iowa Character Committee's questions regarding pacifists; examiners "always want to know what you would do if your wife was being raped"); Brown & Fasset, *supra* note 116, at 488 (Marshall Plan); *N.Y. Comm. Rep.*, *supra* note 101, at 19 (campus activism). For example, one applicant received guidance in the form of a lecture why "students should keep their mouths shut and just study while at the university, and leave government to the more mature." *Id.* See also *supra* pp. 543-44.

355. See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971) (plurality opinion); *Baird v. State Bar*, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971).

356. For example, in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241-43 (1957), the Court gave serious consideration to arrests arising from labor activism and an indictment for soliciting volunteers to assist Spanish Loyalists occurring some 15 years prior to application for the bar. State Supreme Court cases and reports of bar examiners reflect similar concern. See *supra* notes 218-25 and accompanying text, and *infra* notes 361-62 and accompanying text.

357. See cases cited *supra* note 355; *In re Application of Cassidy*, 268 A.D. 282, 51 N.Y.S.2d 202 (N.Y. App. Div. 1944) (denying admission to applicant belonging to Father Coughlin's Christian Front Organization).

358. *In re Summers*, 325 U.S. 561 (1945).

359. *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); see also Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 *VAND. L. REV.* 655, 683-92 (1981) (analysis of extent to which *Anastaplo* and *Konigsberg* remain good law).

about membership in groups with aims to overthrow the government; twenty-five percent demand an affirmation of loyalty to the government or state and U.S. constitutions. Nevada inquires if the candidate is a member of the Communist Party, and Tennessee requires disclosure of all organizations to which the applicant belongs, a question flatly inconsistent with Supreme Court holdings.³⁶⁰ Eighty percent of all jurisdictions would or might investigate conduct such as sit-ins resulting in misdemeanor convictions or membership in radical organizations, although prevailing precedents suggest that such activities could not legitimately warrant exclusion.³⁶¹ Similarly, campus activism remains of interest to some committees, despite the absence of any reported decisions denying admission to candidates on that basis.³⁶²

This political oversight is troubling on two dimensions. From a constitutional perspective, character review may inhibit a range of expressive activity by potential applicants, or may deter those with political offenses from seeking admission to the bar. Although the record before the Court in *Law Students Research Council v. Wadmond* failed to persuade the majority that "careful administration of such a system as New York's need result in chilling effects upon the exercise of constitutional freedoms,"³⁶³ certain data reviewed for this study suggest otherwise. Applicants who have denounced government policy, law school administrators, bar certification processes, or the ABA Code of Professional Responsibility have not found favor with local committees.³⁶⁴ Also, since most state

360. *Baird v. State Bar*, 401 U.S. 1, 6 (1971) (plurality opinion); *In re Stolar*, 401 U.S. 23, 30 (1971); see also *Shelton v. Tucker*, 364 U.S. 479 (1960) (overbroad inquiry into teacher's past associations); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958) (anonymity of membership lists).

361. There have been no reported cases over the past half century denying admission solely on the basis of sit-in misdemeanor convictions, and the Supreme Court has held that Communist Party membership will not of itself justify exclusion. See sources cited *supra* note 360.

362. See Tables 5 & 6, *supra* pp. 535, 536.

363. 401 U.S. 154, 167 (1971).

364. *Siegel v. Committee of Bar Examiners*, 10 Cal. 3d 156, 514 P.2d 967, 110 Cal. Rptr. 15 (1973) (reversing committee's denial of applicant who had allegedly not been candid in describing his political speeches). One basis on which the Arizona Character Committee found Edward Ronwin mentally unfit was his "irresponsible and highly derogatory untrue public accusations" against law school administrators and faculty. *Application of Ronwin*, 113 Ariz. 357, 359, 555 P.2d 315, 317 (1976), *cert. denied*, 430 U.S. 907 (1977). A New York applicant ran into problems by stating that he believed the *Code of Professional Responsibility* was "phony" (since lawyers did not adhere to it), and that attorneys charged too much and rendered too little public service. *Chairman, N.Y. Char. and Fitness Comm.*, 7th Dist. (Dec. 20, 1982). Any evidence that the candidate does not share the profession's official views on unauthorized practice will almost certainly result in further investigation. See *Interview, Member, Ill. Char. and Fitness Comm.*, 3d Dist. (July 18, 1983) (unauthorized practice); *Interview, Chairman, N.Y. Char. and Fitness Comm.*, 8th Dist. (July 18, 1983) (same). Public criticism of certification processes has also adversely affected judicial determinations. *Application of Stone*, 74 Wyo. 389, 288 P.2d 767 (1955). It may well be that Edwin Ronwin's challenge to the Arizona bar's grading of his exam did not enhance his case in subsequent character certification proceedings, see *Application of Ronwin*, 113 Ariz. at 357, 556 P.2d at 315; Mann, *Low Comedy at the High Court*, *Am. Law.*, Apr. 1984, at 114, 115.

bars demand disclosure of all arrests and criminal charges, and since protesters frequently run the risk of unlawful arrest, the chilling effects of certification may extend to protected political conduct.³⁶⁵ While the degree of such deterrence is difficult to assess, a third of the respondents in one law student survey reportedly had refrained from certain activities because of the impending character review. Among the activities cited were attending political rallies, signing petitions, and seeking an Army deferment on psychological grounds.³⁶⁶

Whatever the effect on constitutionally-protected activity, the bar's oversight process remains disturbing on other grounds. To constitutional scholars such as Harry Kalven, "[w]hat is really at stake" in certification procedures is the "image of what kind of conformity the Bar will require."³⁶⁷ And the image now cultivated reflects an insular and impoverished concept of character. For two millennia, philosophers have viewed steadfast adherence to principle as one of the cardinal virtues.³⁶⁸ So too, contemporary developmental psychologists have defined the highest stage of moral development in terms of commitment to individualized principles of justice, dignity, and equality that supersede social norms and legal codes.³⁶⁹ Yet it is precisely the candidates who display such commitment whose character is suspect under bar standards.

What initially triggered committee scrutiny of George Anastaplo was his personal essay defending the right to revolution as articulated in the Declaration of Independence. What prevented his certification was a principled refusal to deny associations for which there was no basis in the record.³⁷⁰ In other cases, conscientious objectors have been damned as shirkers or subversives, and nonviolent civil disobedience has been denounced as disrespect for law.³⁷¹ In a profession devoted to preserving

365. See Appendix I. For discussion of the frequency of unlawful arrests, see *Brief for Appellants* at 35–37, *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971) and sources cited therein; A.C.L.U. OF SOUTHERN CALIFORNIA, *DAY OF PROTEST, NIGHT OF VIOLENCE: THE CENTURY CITY PEACE MARCH* (1967); see also *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957) ("fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct").

366. Papke, *supra* note 86, at 18–19.

367. Kalven & Steffen, *supra* note 354, at 178.

368. See generally P. FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 2 (1978) (cardinal virtues courage, temperance, wisdom, and justice); P. GEACH, *THE VIRTUES* (1977); J. POCOCK, *supra* note 293; G. VON WRIGHT, *THE VARIETIES OF GOODNESS* 133 (1963) ("function proper to man . . . is activity in accordance with a rational principle").

369. The seminal work is that of Harvard psychologist Laurence Kohlberg. See, e.g., L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981); Kohlberg, *supra* note 303. See also C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (stressing values of care and concern for others that transcend abstract legal requirements).

370. See *In re Anastaplo*, 366 U.S. 82, 98–102 (1961) (Black, J., dissenting); J. LIEBERMAN, *THE TYRANNY OF THE EXPERTS: HOW PROFESSIONALS ARE CLOSING THE OPEN SOCIETY* 97–99 (1970).

371. See *In re Application of Brooks*, 57 Wash. 2d 66, 68, 355 P.2d 840, 841 (1960) (conscien-

principle over expediency, and to maintaining the spirit as well as the letter of the law, the value judgments implicit in these proceedings verge on perversity. The records in cases such as *Anastaplo*, *Konigsberg*, and *Summers* were replete with evidence of intellectual distinction, personal integrity, and commitment to democratic principles.³⁷²

By penalizing a show of character in proceedings nominally designed to detect it, the bar has enshrined a morality *manqué*. To view subservience to authority as a requisite for virtue is to ignore a history rich in counter-examples. American ideals of liberty, equality, and dignity have sometimes found their highest expression in peaceful defiance of legal mandates. Abolitionists, civil rights activists, suffragists and labor organizers—indeed, the architects of our constitutional framework—all were guilty of “disrespect for law” in precisely the sense that bar examiners employ it. As long as that criterion remains an indice of moral merit, the certification process will exemplify a commitment to conformity that makes a mockery of the bar’s highest traditions.

C. *Due Process Values*

As the Supreme Court has long recognized, pursuit of a chosen vocation is one of the core liberties protected by the due process clause of the Fifth and Fourteenth Amendments.³⁷³ Accordingly, certification and disciplinary procedures must satisfy the requirements of specificity and regularity that give content to those constitutional guarantees. In addition, the scope of bar inquiry into personal affairs implicates concerns of privacy and substantive rationality that are also subject to due process constraints. The significance of these constitutional issues cannot be assessed solely or even primarily in doctrinal terms. As a policy matter, the societal values from which due process mandates draw should inform any judgments about the legitimacy of current character proceedings.

tious objector’s failure to report for alternative duty constituted ground for denial), *cert. denied*, 365 U.S. 813 (1961); Papke, *supra* note 86, at 17–18 (discussing Ohio committee’s equation of pacifists and communists, and its exclusion of Clyde Summers for failure to answer questions regarding Communist Party membership); Application of Walker, 112 Ariz. 134, 138, 539 P.2d 891, 895–96 (1975) (denying admission for failure to register for draft), *cert. denied*, 424 U.S. 956 (1976); Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966) (reversing committee decision to exclude applicant, in part because of civil disobedience conviction).

372. For example, *Konigsberg* had 42 character references, and *Anastaplo* was a war veteran who had graduated at the top of his class and had earned impeccable recommendations. See J. LIEBERMAN, *supra* note 370; Kalven & Steffen, *supra* note 354, at 178; Patner, *supra* note 226, at 188.

373. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103 (1963); *In re Ruffalo*, 390 U.S. 544, 550 (1968).

Moral Character as Professional Credential

1. *Vagueness*

Although the Supreme Court has summarily dismissed vagueness challenges to the moral character requirement on the theory that “long usage” has given “well-defined contours” to the term,³⁷⁴ the survey data reviewed above afford little support for that determination. Prevailing standards have raised precisely the problems of fair notice and consistency in application that the void-for-vagueness doctrine was meant to curb.

As the Supreme Court has frequently made plain in other contexts, a legal mandate that is phrased “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process”³⁷⁵ By this standard, character mandates raise obvious difficulties. Surely moral merit is at least as elusive as other terms the Court has declared infirm, such as “gangsters,” “sacreligious,” “humane,” and “credible and reliable.”³⁷⁶

On its face, the bar’s character requirement is—in Justice Black’s phrase—“unusually ambiguous,”³⁷⁷ and court and committee amplification have done little to refine analysis. Prevailing definitions of virtue are circular or conclusory, and there is broad disagreement regarding particular conduct within and across jurisdictions. Individuals of “common intelligence” clearly do differ in their normative assessment of a vast range of conduct, including bankruptcy, barroom brawls, bounced checks, sexual activity, drug or alcohol usage, civil disobedience, and psychological problems.³⁷⁸ Given such inconsistencies in application, the standard scarcely affords adequate notice of “conduct to avoid”³⁷⁹ or of the professional consequences of prior activities. Indeed, as lower courts have recognized in other contexts, the character requirement is so “imprecise as to be virtually unreviewable.”³⁸⁰

Moreover, current certification structures have proven largely unresponsive to those indeterminacies. Only a tiny percentage of disputed cases generate written opinions by either courts or bar examiners, and not all

374. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 159 (1971), discussed *supra* pp. 567–68.

375. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted).

376. *City of Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481, 2504 (1983) (ordinance requiring physicians to dispose of unborn child after abortion in humane and sanitary manner); *Kolender v. Lawson*, 461 U.S. 352, 358–61 (1983) (California statute requiring persons who loiter or wander on streets to provide credible and reliable identification to police); *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504–05 (1952); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

377. *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957).

378. *See supra* p. 532–46.

379. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 108 & n.3 (1972) and cases cited therein.

380. *Genusa v. City of Peoria*, 475 F. Supp. 1199, 1206 (C.D. Ill. 1979) (quoting *Bayside Enters. v. Carson*, 450 F. Supp. 696, 707 (M.D. Fla. 1978)).

bar decisions are readily available.³⁸¹ Only three states have published policies regarding the types of conduct that would prompt investigation; the general assumption, as the California Board candidly concedes, is that no "meaningful guidelines can be stated."³⁸² Nor does any jurisdiction publish statistics on the number of character investigations, hearings, or denials of certification. This reticence may not be entirely inadvertent. A commission charged with reviewing New York's character and fitness procedures concluded that committees appeared to fear that public disclosure of the low incidence of denials would "ruin the mystique" of the process and "interfere with the deterrent function . . . [of] discouraging individuals from going to law school if 'they have something to worry about.'"³⁸³

Few jurisdictions provide definitive advice to applicants wondering if they do, in fact, have something to worry about. Only nine states make some systematic attempt to flag difficulties through a law school registration process. Although a third permit an applicant to petition the bar for guidance, preliminary rulings are binding in only six states (12%). Generally, committee members prefer to give personal opinions rather than formal assurances. For example, one Illinois applicant learned only that his arrest and incarceration during a 1970's protest movement would "probably not be held against him," although the committee chairman "couldn't say for sure."³⁸⁴ Similarly, a Maine bar examiner recalled telling candidates who had evaded military service that he couldn't "speak for the Board" but that these problems "didn't bother him too much."³⁸⁵ In the majority of states, the prospective law student takes his chances and, even where advance determinations are theoretically possible, few applicants apparently find them useful. Jurisdictions which permit such rulings currently make an average of only 1.6 per year (N=14).

Moreover, the vices of vagueness include not only the absence of notice, but also the absence of constraints on arbitrary government action. Implicit in our concept of ordered liberty is the ideal of a "government of

381. The infrequency of judicial determinations is discussed *supra* p. 517. Among the 14 administrative hearing processes surveyed in depth, practices regarding written opinions vary widely. Only one jurisdiction issues such opinions if a problem candidate is admitted, and several do not explain their denials. Maine theoretically would issue an opinion if it withheld certification, but has not done so in recent years. Interview, Chairman, Me. Bd. of B. Examiners (Aug. 21, 1983). Even states that provide written decisions in instances of denial do not necessarily circulate them. In Michigan, Board opinions are available to the public in the Bar Examiner's office. Interview, Member, Mich. Bd. of B. Examiners (July 12, 1983).

382. California Board of Bar Examiners' Letter to Law Schools and Applicants (1970), *reprinted in* Note, *The Good Moral Character Requirement for Admission to the Bar*, 4 SAN FERN. V.L. REV. 317, 330-31 (1975).

383. *N.Y. Comm. Rep.*, *supra* note 101, at 28.

384. Interview, Chairman, Ill. Char. and Fitness Comm., 1st Dist. (July 11, 1983).

385. Interview, Chairman, Me. Bd. of B. Examiners (Aug. 21, 1983).

laws, and not of men.”³⁸⁶ One primary function of the due process clause is to limit state departures from that ideal. By requiring some specificity in standards, the void-for-vagueness doctrine seeks to restrain erratic and capricious governmental oversight. Given the limitations and expense of ad hoc appellate review, legal mandates must be framed with sufficient precision to afford a certain regularity in administration as well as the “appearance of even-handed justice.”³⁸⁷ Such precision also serves to ensure that fundamental policy choices underlying the exercise of state power rest with publicly accountable representatives.

By these criteria, both the certification and disciplinary process remain troubling. Assessments of virtue have proved highly idiosyncratic. In the absence of meaningful standards, courts and committees have simply aired their preferences and prejudices. Applicants within and across jurisdictions receive different treatment depending on the decisionmaker’s subjective evaluation of their attitudes, mores, lifestyle, and professional associations. Of course, in a sense, the very arbitrariness of the system provides some protection against lasting injustice. If damned by one tribunal, individuals with stamina and resources may find a more sympathetic forum elsewhere—in an appellate court, a different jurisdiction, or (after time has passed) a changed local committee. But that possibility scarcely redeems the current enterprise. To the contrary, it underscores the pointlessness of expending vast resources on a structure that cannot hope to accomplish any consistent or coherent screening function.

Moreover, the vices of vagueness are by no means confined to substantive standards regarding character. As Appendix I reflects, many questions on bar applications are phrased so ambiguously that applicants must speculate, under peril of perjury, as to what precisely is subject to disclosure. For example, a number of jurisdictions (6%) ask about any “charges made” or “claims against [the applicant] that were not the subject of legal proceedings,” an inquiry broad enough to encompass innumerable private disputes. About a fifth of all states (22%) inquire about dismissals and resignations because of “unsatisfactory” work, or conduct constituting “unauthorized practice of law,” both of which call for characterizations

386. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring) (“[P]rocedure . . . spells much of the difference between rule by law and rule by whim or caprice.”).

387. *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring); see also Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 89 (1960) (procedures must assure “a certain overall probability of regularity”). For general accounts of the role of due process in ensuring governmental regularity, see Gray, *Procedural Fairness and Substantive Rights*, in XVIII NOMOS 182 (J. Pennock & J. Chapman eds. 1977); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); Summers, *Evaluating and Improving Legal Processes—A Plea for “Process Values,”* 60 CORNELL L. REV. 1 (1974); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

open to competing interpretations.³⁸⁸ Several states (8%) demand information about any "immoral," "dishonorable," or "improper" conduct, and one-third contain a catch-all question concerning all "other unfavorable incidents" not previously disclosed that could bear on the applicant's "character or fitness to practice."

Of course, the vagueness of prevailing certification standards and inquiries does not of itself establish a constitutional claim. A central question, to which discussion in Part VII is addressed, is the feasibility of alternatives. But before that issue is analyzed in any depth, certain other costs of moral oversight bear emphasis.

2. *Privacy and Substantive Rationality*

To extend privacy's penumbra into yet another regulatory arena is an enterprise to be approached with considerable caution. As Judith Thomson has observed, "the most striking thing about the right to privacy is that nobody seems to have any clear idea what it is."³⁸⁹ The doctrine's easy elasticity renders it an already "over-burdened camel" carrying ill-defined conceptual freight.³⁹⁰ Yet one cannot evaluate the merits of moral oversight without some attention to the invasive character of character inquiries. Nor is it possible to assess the need for such intrusions without reference to the most basic constitutional constraint on licensing criteria—that they be rationally related to fitness for practice.

The evolution of the Supreme Court's privacy decisions has been alternately celebrated and condemned elsewhere, and need not be reassessed here. For present purposes, what bears note is the general thrust of those decisions, which gives force to certain core notions of individual autonomy, intimacy, and identity.³⁹¹ In cases dealing with contraception, procreation, family life, and public surveillance, the Court has carved out sanctuaries from state intrusion.³⁹² While the invasiveness common in bar character

388. See *N.Y. Comm. Rep.*, *supra* note 101, at 58 (unauthorized practice too ambiguous a term to be retained); Rhode, *supra* note 93, at 45-53 (describing ambiguity and inclusiveness of prevailing definitions of unauthorized practice).

389. Thomson, *The Right to Privacy*, 4 *PHIL. & PUB. AFF.* 295, 295 (1975).

390. Gerety, *Redefining Privacy*, 12 *HARV. C.R.-C.L. L. REV.* 233, 296 (1977). See generally Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326 (1966) (privacy imprecise, probably incapable of delimiting public sphere).

391. See A. WESTIN, *PRIVACY AND FREEDOM* (1970); Craven, *Personhood: The Right to be Let Alone*, 1976 *DUKE L.J.* 699; Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421 (1980); Gerety, *supra* note 390; Reiman, *Privacy, Intimacy, and Personhood*, 6 *PHIL. & PUB. AFF.* 26 (1976).

392. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Fourth Amendment protections against unreasonable searches and seizures are grounded on similar values. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967).

proceedings seldom rises to the dimensions presented in those seminal privacy cases, the values implicated are of the same general order.

Most certification processes operate without any formal boundaries on their scope of inquiry. Only about a fifth of the sampled states apply rules of evidence or formal constraints on questions examiners are authorized to ask.³⁹³ In general, committee inquiry ranges as broadly as members wish, and hearings may last anywhere from fifteen minutes to ten days.³⁹⁴ In all but one sampled jurisdiction, these hearings are not necessarily restricted to the areas that triggered review.

So too, as Appendix I and the following overview reflect, most state bar applications display equally unbounded interest in candidates' personal backgrounds. Yet a vast amount of the biographical data demanded bears no meaningful relationship to the legitimate objectives of bar certification. And the undisciplined scope of inquiry opens opportunities not only for unwarranted intrusions, but also for capricious and prejudicial inferences from irrelevant information.

a. Family, Educational, and Employment Background

Most bar applications begin with an extended series of questions regarding family and early academic background. More than half the states (57%) want to know who the candidate's parents are; over a quarter (29%) ask about parental occupations, and a few have questions about parental birthplaces (4%), mother's maiden name (10%), and siblings' names or occupations (6%). Some jurisdictions are interested in what grade school (10%) or junior high school (24%) the candidates attended, or in their high school scholastic performance and extracurricular activities (4%). Disciplinary sanctions received in high school (63%) and college (86%) are of common concern; since only three states limit their questions to matters involving dishonesty, many scholastic problems or petty pranks will fall within disclosure obligations. Several states, including New York, inquire whether applicants have ever been denied admission to academic institutions for reasons relating to character, although how candidates are expected to have such information is unclear.

Many questions regarding employment history are equally intrusive. About a third of the states demand employment histories beginning for most applicants at age sixteen or earlier. Almost half the states want to know about dismissals, or resignations for unsatisfactory work (22%) or any other causes (24%), and a number inquire about all accusations of

393. New Jersey does not ask about political or religious beliefs, sexual conduct, or psychiatric treatment short of hospitalization. Idaho does not inquire into bankruptcies.

394. The average hearing lasts about six hours.

dishonesty (10%). Several states (8%), including California, ask applicants to account for all time periods since age eighteen; every candidate must disclose "where you were and what you did" during any interval not covered by other questions regarding education and employment. In other jurisdictions, the candidate must identify future employers (6%).

The necessity for such scrutiny of all applicants is not self-evident. It is inconceivable that most of this information could ever prove relevant, let alone determinative, in certification disputes; published decisions are not replete with references to applicants' high school extracurricular activities or teenage employment. Disclosures concerning parental occupation, maiden name, and birthplace, or candidates' employment or pre-college school affiliations may invite the kind of class and ethnic biases that once figured all too heavily in the bar's admission policies.³⁹⁵ Even questions more closely related to practice are often phrased in such overinclusive form as to defy reasoned justification. Not every resignation from employment warrants explication. And remote incidents of minor misconduct have so little predictive force that their inclusion may be more prejudicial than probative.

b. *Legal Involvement and Financial History*

All jurisdictions inquire about involvement in criminal proceedings, and most have concerns that extend well beyond felony offenses. As noted earlier, over half the states (59%) demand disclosure of all convictions, including misdemeanors, and all arrests (51%); many jurisdictions specifically include expunged (24%) or juvenile (20%) offenses, and parking violations (14%). Some states also inquire about questioning (14%), accusations (8%), warnings (4%), testimony (6%), refusals to testify (6%), and requests to appear before a prosecutor or investigative agency (6%). New York demands to know the number of unpaid traffic tickets.

About two-thirds of the states ask if the applicant has been involved in any civil proceedings (63%) or has any unsatisfied judgments against him (67%). Some jurisdictions specifically inquire about certain types of action, such as bankruptcy (63%), divorce (43%), or unauthorized practice of law (20%). In a significant minority of jurisdictions, applicants must also provide extended personal financial information, including debts past due (27%), dishonored checks (4%), and institutions or individuals with whom credit has been established over the past five years (10%).

Such inquiries are scarcely well-tailored to minimize intrusive or capricious administration of character requirements. The breadth of these standard application forms licenses the kind of arbitrary and empirically

395. See *supra* pp. 500-03.

unwarranted assessments detailed above. Since relatively few questions include any time constraints, their scope includes conduct that may be so remote at the time of application as to bear no rational relationship to current fitness to practice. It is by no means apparent why violation of a fishing license statute a decade earlier remains an appropriate subject of professional concern.³⁹⁶ Nor is it clear that the certification process is an appropriate vehicle for collecting parking fines, child support payments, and student loans.³⁹⁷ A willingness to discharge such obligations under threat of non-certification is indicative perhaps of prudence but scarcely of moral fiber. Forcing candidates in character interviews to explore the status of their credit card accounts simply trivializes the enterprise.³⁹⁸

Moreover, the scope of bar inquiry compromises other societal interests. Requiring revelation of all arrests, or of juvenile or expunged offenses, is particularly troubling in light of the statutory provisions in most states generally shielding such information from compelled disclosure.³⁹⁹ The public policies underlying such legislation—that adverse inferences should not be drawn from conduct of marginal probative value—are as applicable to bar certification decisions as to other licensing and employment determinations. And, as a practical matter, certain bar inquiries penalize protected conduct such as cooperation as a witness in criminal proceedings or recourse to civil remedies. Risk-averse applicants who wish to serve the system of justice would be well advised to avoid contact with it prior to certification. To be sure, it is unclear how many applicants are sufficiently aware of bar policies to shape their conduct accordingly. Yet to the extent that certification processes discourage direct legal involvement, the result may be a loss of perspective among potential practitioners.

c. *Marital Relations and Sexual Conduct*

Interest in applicants' sex lives and marital status has diminished over time, but a certain degree of intrusiveness remains acceptable in many quarters. Almost half (43%) the state bar applications ask about divorce, and over a third (39%) specifically demand legal records of the proceed-

396. See *supra* p. 538.

397. See *supra* p. 541.

398. *N.Y. Comm. Rep.*, *supra* note 101, at 35.

399. Every jurisdiction has laws or regulations concerning the privacy, security, and accuracy of criminal history records. See *Crim. Justice Newsletter*, Aug. 16, 1982, at 7 (citing Bureau of Justice statistics, criminal justice information policies). Many states, including New York, have statutory prohibitions that ban discrimination based upon, or inquiries relating to, juvenile offenses and arrests that terminated in favor of the accused. See *N.Y. CRIM. PROC. LAW* § 160.60 (McKinney 1981); *N.Y. EXEC. LAW* § 296.14 (McKinney 1982); *N.Y. JUD. LAW* §§ 781-784 (McKinney 1983); see also Note, *Criminal Procedure: Expunging the Arrest Record When There Is No Conviction*, 28 *OKLA. L. REV.* 377, 386-87 (1975) (citing statutes).

ing. A minority of applications inquire whether married couples are living together (14%) and if not, why not (4%).

Although current projections indicate that almost half of all marriages will end in divorce,⁴⁰⁰ some examiners nonetheless find the experience indicative of character difficulties. Several committee members expressed concern about divorces that could "interfere with the ability to practice law," or "reflect badly on professional trust and [applicants'] ability to control their personal lives."⁴⁰¹ And some applicants have reported humiliating interchanges concerning their "breach[ing] the most sacred contract of them all."⁴⁰²

The increasing incidence of open cohabitation and homosexuality has also not been regarded indulgently in many jurisdictions. Recent surveys indicate that some 3.6 million individuals are living with unmarried persons of the opposite sex; approximately twenty-five percent of all college undergraduates have engaged in such conduct, and another fifty percent reportedly would do so if the opportunity arose.⁴⁰³ An estimated one-third of all adult males have had homosexual experiences.⁴⁰⁴ Nevertheless, almost forty percent of all surveyed jurisdictions would or might investigate such conduct.⁴⁰⁵ As the executive director of one board of bar examiners explained:

There is nothing on our application which inquires into this area. However, if it were brought to our attention, from the personal interview or elsewhere, it may well be something the Board would want to follow up on. I would like to think that there are those forms of lifestyles that [any jurisdiction] would find unacceptable in an attorney.⁴⁰⁶

To some courts and committee members, "living in sin" has qualified as one such "unacceptable" lifestyle. A 1977 Committee Report on New York procedures found that cohabitation (or separate residences for married couples) continued to be a "basis for deferring an application, subjecting an applicant to a more thorough investigation, and, in some judi-

400. A. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 25 (1981) (estimating that if current rates remain constant, 48% of those married will eventually obtain divorces).

401. Interview, Chairman, Va. Temporary Char. and Fitness Comm., 26th Dist. (June 21, 1983); *see also* Interview, Chairman, N.Y. Char. and Fitness Comm., 2d, 10th & 11th Dists. (June 11, 1983) (indicating that his interview might include discussions of divorce).

402. Papke, *supra* note 86, at 20 (quoting New York Comm. member).

403. *See* Macklin, *Non-Marital Heterosexual Cohabitation*, 1 *MARRIAGE & FAMILY REV.* 1, 2 (1978) (citing surveys); Spanier, *Married and Unmarried Cohabitation in the United States: 1980*, 45 *J. MARRIAGE & FAMILY* 277 (1983).

404. A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 623 (1948).

405. *See* Table 4, *supra* p. 534, at cols. 1 & 2.

406. Interview, Exec. Dir., Ind. Bd. Bar Examiners (no date).

cial districts, certifying the facts relating to an applicant's living arrangements to the appropriate Appellate Division. . . ."⁴⁰⁷ Such practices reportedly "scare[d] the hell" out of unmarried female candidates in New York as well as in certain other states.⁴⁰⁸ One celebrated case involved a 1975 Arizona applicant who was cohabiting with an admitted male attorney. Although no disciplinary inquiry was ever commenced against her fellow sinner, the female candidate submitted to formal and informal hearings exploring the intimate details of her sex life.⁴⁰⁹ The couple ultimately agreed to get married, which allayed the concerns of the bar but not of other candidates. During subsequent application periods, some applicants reportedly obtained separate residences or telephones.⁴¹⁰

Living in sin would also raise problems in certain Virginia districts despite a recent ruling by the state supreme court reversing a denial of certification made on that basis.⁴¹¹ Without any reference to this presumptively controlling precedent, one Virginia interviewer explained that cohabitators "may have been violating a statute," which could show a "contumacious attitude toward the law."⁴¹² On similar reasoning, the West Virginia state bar committee initially denied admission to two unmarried applicants who listed the same residence.⁴¹³ The decision was reversed only after the applicants insisted that, while they shared an apartment, they "really weren't living together" and the "girl" appeared "very insulted" by insinuations of immorality.⁴¹⁴ Although the committee "only had their word," it felt bound to admit the applicants, since "how else are you going to prove this kind of thing?"⁴¹⁵

Comparable evidentiary difficulties have contributed to a reluctant laissez-faire attitude in other jurisdictions as well. At least one examiner who sees indications of cohabitation feels "there isn't much you can do about

407. *N.Y. Comm. Rep.*, *supra* note 101, at 28.

408. Baris, *supra* note 84, at 15, col. 4 (New York).

409. Interview, July 1, 1984. The attorney preferred not to be identified by name.

Among the questions asked at the hearings were the number of bedrooms the couple had, the frequency with which they had sexual relations, and their sexual relationships with other individuals. Since the woman could not find employment without bar certification and was facing substantial loan obligations as well as attorney fees in contesting her denial, the couple determined that marriage was the expedient course. At the time the case began, cohabitation was a felony in Arizona, although no one had been prosecuted under the statute for 47 years. *Id.*

410. *Id.*

411. Interview, Member, Va. B. Comm. on Char. and Fitness, 13th Dist. (July 8, 1983); Interview, Chairman, Va. Temporary Char. and Fitness Comm., 26th Dist. (June 21, 1983); Cord v. Gibb, 219 Va. 1019, 254 S.E.2d 71 (1979).

412. Interview, Chairman, Va. Temporary Char. and Fitness Comm., 26th Dist. (June 21, 1983).

413. Interview, Sec., W. Va. Bd. of Law Examiners (July 7, 1983).

414. *Id.*

415. *Id.*

it.”⁴¹⁶ As one respondent explained, “As bar counsel, I could raid people’s bedrooms, but I’m not sure I want to get into that.”⁴¹⁷

Yet why applicants should have to rely on individual examiners’ sense of self-restraint is not self-evident. States have ample other, more publicly accountable, means of enforcing divorce and fornication laws than humiliating bar applicants. Given the sexual privacy interests recognized in Supreme Court decisions concerning both married and unmarried couples,⁴¹⁸ such proctoring by the bar’s self-appointed spokesmen exceeds rational limits. In a variety of other employment contexts, courts have increasingly demanded tangible evidence of a relation between alleged “immorality” and ineffective job performance.⁴¹⁹ Absent any plausible basis for assuming that divorced or cohabiting lawyers are unfit to practice, the domestic arrangements of bar applicants should not be open to professional scrutiny.

Similar considerations apply to homosexual behavior. Since disrespect for law remains a rationale for non-certification, and since noncommercial homosexual conduct between consenting adults is unlawful in forty-three states and the District of Columbia, the potential for intrusive and capricious committee action remains substantial.⁴²⁰ Only California has a formal policy declaring sexual preference irrelevant to practice. Although some state courts have come to similar conclusions with respect to particular applicants, their holdings by no means foreclose extensive and degrading interrogation.⁴²¹ For example, in one of these jurisdictions, a 1981 applicant who had been excluded from military service on grounds of ho-

416. Interview, Sec., Me. Bd. of B. Examiners (Aug. 19, 1982).

417. Interview, Counsel, Idaho B. (Aug. 17, 1982).

418. See, e.g., *Carey v. Population Servs.*, 431 U.S. 678 (1977) (minors have right to buy contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (married and unmarried couples both have right to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to purchase or use contraceptives).

419. See, e.g., *Andrews v. Drew Mun. Separate School Dist.*, 507 F.2d 611 (5th Cir. 1975) (status as unwed mother has no rational relation to teaching ability), *cert. dismissed*, 425 U.S. 559 (1976); *Fisher v. Snyder*, 476 F.2d 375 (8th Cir. 1973) (divorced female teacher who entertained overnight guests reinstated after being fired for conduct unbecoming a teacher); *Drake v. Covington County Bd. of Educ.*, 371 F. Supp. 974 (M.D. Ala. 1974) (unwed pregnant school teacher reinstated); see also *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (homosexual act by teacher not sufficient to justify license revocation). But see *Dronenburg v. Zech*, 741 F.2d 1388 (dismissal of homosexual Navy officer proper because “private, consensual, homosexual conduct is not constitutionally protected”); *Singer v. United States Civil Serv. Comm’n*, 530 F.2d 247 (9th Cir.) (dismissal of activist homosexual civil servant proper and constitutional), *vacated*, 429 U.S. 1034 (1976); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (upholding discharge of homosexual from Navy); *Gaylord v. Tacoma School Dist.*, 88 Wash. 2d 286, 559 P.2d 1340 (teacher’s homosexuality immoral and impairs fitness to teach), *cert. denied*, 434 U.S. 879 (1977).

420. See Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1613 n.1 (1974) and statutes cited therein.

421. See Florida Bd. of Bar Examiners Re N.R.S., 403 So. 2d 1315 (Fla. 1981); *In re Kimball*, 40 A.D.2d 252, 339 N.Y.S.2d 302, *rev’d and remanded on other grounds*, 33 N.Y.2d 586, 347 N.Y.S.2d 453, 301 N.E. 2d 436 (1973).

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homosexuality submitted to an hour and a half of "every tricky question about his sex life [examiners] could dream of."⁴²²

Such inquiries, which can occur in disciplinary as well as certification proceedings, offend the most basic principles of due process. As noted earlier, homosexuality is an unreliable predictor of conduct relevant to practice.⁴²³ And other forms of sexual behavior, which bar disciplinary authorities have occasionally monitored, bear an equally attenuated relationship to professional capacities.

To be sure, the data compiled in this study do not reveal pervasive scrutiny of sexual conduct; examiners are seldom in a position to know of consensual behavior. Nonetheless, the potential for intrusiveness remains. Bar oversight may subject applicants to fear of blackmail or delay, or penalize those with the courage to acknowledge their status openly. To the extent that certification processes carry symbolic freight, the current baggage is highly objectionable. The implication that homosexuality represents a defect in moral character helps to legitimate a form of prejudice inconsistent with evolving concepts of individual dignity and autonomy.

d. *Mental and Emotional Fitness*

A final area in which bar inquiry is particularly invasive concerns mental and emotional stability. Ninety percent of all bar applications include questions regarding mental health, such as involuntary (43%) or voluntary (39%) commitment to mental institutions, treatment or diagnosis of mental illness (27%), and treatment or diagnosis of emotional disturbance (12%). Other common questions concern drug or alcohol dependence (67%) and treatment (69%), and general health problems (10%).

Although the effect of such information on character committee deliberations varies widely,⁴²⁴ applicants with a history of treatment clearly risk extended inquiries and delay, and in some instances, a possibility of exclusion. Evidence of religious fanaticism, schizophrenia, unwarranted suspicion, unspecified "mental problems," and "undue contentiousness" have all supported findings of unfitness.⁴²⁵ Yet while mental stability is obvi-

422. *Brookie, Florida Court Prohibits Ban on Gay Lawyers*, *Gay Community News*, Aug. 22, 1981; see also Papke, *supra* note 86, at 20 (indicating that delays and interrogation of homosexuals is "almost certain"; quoting former executive secretary of Manhattan committee: "We have to take a close look.")

423. See *supra* note 310 and accompanying text.

424. See *supra* pp. 540-41.

425. See, e.g., *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976) (rejecting committee's finding that applicant persistently brought "groundless claims" in court proceedings, though still finding him "paranoid" and "not mentally able" to practice), *cert. denied*, 430 U.S. 907 (1977); *In re Martin-Trigona*, 55 Ill. 2d 301, 302 N.E.2d 68 (1973) (denying admission to attorney applicant in part on basis of irrational behavior regarding pending lawsuit), *cert. denied*, 417 U.S. 909 (1974); *Application of Stone*, 74 Wyo. 389, 397, 288 P.2d 767, 771 (1955) (attorney applicant's initiation of

ously relevant to practice, current certification standards license untrained examiners to draw inferences that the mental health community would itself find highly dubious. As noted earlier, even trained clinicians cannot accurately predict psychological incapacities based on past treatment in most individual cases.⁴²⁶ To the extent that bar oversight deters psychological or psychiatric treatment, the current approach is simply perverse. Penalizing those who recognize a need for assistance is unlikely to yield greater mental health among the practicing bar.

Moreover, even with respect to problems most likely significantly to affect an individual's professional practice, forecasts in individual cases rarely will be conclusive.⁴²⁷ Given such indeterminacy, the desirability of preemptive screening is equally open to dispute. Some of those deterred or denied admission may have considerable potential as legal practitioners.⁴²⁸ Indeed, the irony, if not hypocrisy, of excluding individuals on the ground of "contentiousness" from a profession that generally rewards it, should not escape notice.

Nor should the bar's anomalous posture with respect to confidentiality pass without comment. When the attorney-client privilege is at issue, lawyers have consistently maintained that compelled disclosures will chill the kind of candid interchange necessary for informed assistance.⁴²⁹ Yet the profession is entirely comfortable requiring applicants with histories of psychological treatment to waive the privilege for therapeutic communication that is recognized to varying degrees in most states.⁴³⁰ Such a policy is scarcely conducive to fostering the candor and trust on which effective therapeutic relationships depend.⁴³¹ It is also flatly at odds with mandates

suits for recovery of fees evidence of "unduly contentious spirit"), *cert. denied*, 352 U.S. 815 (1956); see also sources cited *supra* notes 205 & 308.

426. See *supra* p. 560.

427. *Id.*

428. For cases in point, see *supra* note 326.

429. For discussion of the bar's conventional position, see Rhode, *supra* note 217, and sources cited therein.

430. Twenty-six states have statutes recognizing a psychologist- or psychotherapist-patient privilege. In addition, Connecticut has a specific psychiatrist-patient privilege. The privilege available in most states applies to psychologists. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2286 n.23, 2380 n.5 (1961 & Supp. 1984). For general discussion of the policies underlying these statutes, see Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 647-68 (1976); Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631.

431. *Trammel v. United States*, 445 U.S. 40, 51 (1980) (justification for privileges "rooted in the imperative need for confidence and trust"); Elliston, *Character and Fitness Tests: An Ethical Perspective*, B. EXAMINER, Aug. 1982, at 8, 13 (bar policy on disclosure of psychological assistance received may discourage lawyers from seeking help); Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 118 AM. J. PSYCHIATRY 773, 734 (1962) ("the overwhelming view of psychiatrists is that patients need and expect assurance that their disclosures will remain confidential"); Kaslow, *supra* note 308, at 43 ("person who has the insight and strength to seek help may be more vulnerable to additional inquiries . . . than another person . . . much less stable but with no psychiatric history"); Note, *Functional Overlap Between the Lawyer and Other*

of the American Psychiatric Association and the American Psychological Association, which authorize disclosure of confidences only to prevent clear and immediate danger, a circumstance rarely applicable in certification contexts.⁴³² To be sure, not all individuals undergoing treatment will be aware of the risk of compelled disclosures in subsequent bar certification proceedings. But forcing those individuals who are aware to choose between developing adequate therapeutic relationships and minimizing certification difficulties is not readily justified given the limited value of the information likely to be provided.⁴³³ That licensed attorneys undergoing treatment are not forced to make comparable tradeoffs, despite the temporally more relevant nature of any disclosures, again underscores the perversity of current procedures.

e. *Converging Vagueness and Privacy Concerns*

Under prevailing certification standards, elusive notions of virtue make for expansive state interrogation. As long as the applicant's entire "life history" is thought relevant in admissions, the scope of bar inquiry is not readily cabined.⁴³⁴ Given the vagueness of prevailing standards, applicants are understandably wary of failing to answer any questions, no matter how tenuously related to practice.

In theory, Supreme Court precedent protects applicants who refuse to respond to an inappropriate inquiry, unless they have clear notice of the potential consequences of such refusals.⁴³⁵ In practice, however, it is doubtful that most applicants or even examiners have a firm sense of what those consequences are, or of what constitutes an inappropriate inquiry. Over three-quarters of respondents in the sampled states reported that applicants never declined to answer any questions, and the remainder indicated that such refusals virtually never occurred. When asked whether candidates knew the consequences of a refusal, only one respondent said yes; four said no, and others were unsure. In fact, the repercussions of remaining silent can be quite severe. In the view of many bar examiners, individuals unwilling to respond have not discharged their burden of establishing character and "should not be practicing law."⁴³⁶

Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226, 1262 (1962) (for every two laymen who indicated they would be unaffected by a privilege for psychiatrists, psychologists, or the like, nearly five claimed they would be less likely to make full disclosure).

432. Kaslow, *supra* note 308, at 43.

433. *See supra* p. 560.

434. *See supra* pp. 531-44.

435. *Konigsberg v. State Bar of Calif.*, 353 U.S. 252, 261 (1957).

436. Interview, Chairman, S. Ala. Char. and Fitness Comm. (July 7, 1983); *see also* Interview, Chairman, Mich. Char. and Fitness Comm. (July 8, 1983) (applicant who persisted in refusing to answer relevant question would not be admitted); Interview, Chairman, N.J. Statewide Comm. on Char. (July 20, 1983) (refusals might reflect on applicant's ability to "come clean"); Interview, Pres.-

Given the uncertain price of standing on principle, many applicants undoubtedly acquiesce in unnecessarily intrusive inquiries. Indeed, a favorite anecdote of the former Executive Secretary of Manhattan's character committee involves a candidate described as "a *cum laude* Harvard type, a real intellectual" who "refused to answer some questions because he thought they were unconstitutional. . . . I kept telling him to forget about constitutionality and get admitted, but he wouldn't listen. Finally his firm put the pressure on him, and he answered like a lamb."⁴³⁷ In a context designed to assess character, the bar encourages prudence rather than principle.

Such spectacles devalue the concept of morality they purport to maintain. To enlist applicants, their counselors, and references in disclosure of highly personal information compromises fundamental notions of dignity and autonomy. Moreover, the current system, which affords no meaningful notice of the criteria applied and no assurance that similar cases will be treated similarly within or across jurisdictions, violates the most basic premise of due process. Such intrusive and idiosyncratic oversight ought not to be tolerated if there are alternative means of protecting the public.

VII. ALTERNATIVES

It is somewhat ironic that a profession so adamantly agnostic with respect to most client conduct is so comfortable passing judgment on aspiring practitioners. Too often, the bar has abdicated moral responsibility in practice contexts that demand it,⁴³⁸ while embracing such responsibility in licensing contexts that do not.

The current administration of moral character criteria is, in effect, a form of Kadi justice with a procedural overlay.⁴³⁹ Politically non-accountable decisionmakers render intuitive judgments, largely unconstrained by formal standards and uninformed by a vast array of research that controverts the premises on which such adjudication proceeds. This process is as costly as well as empirically dubious means of securing public protection. Substantial resources are consumed in vacuous formalities for routine applications, and non-routine cases yield intrusive, inconsistent, and idiosyncratic decisionmaking. Examiners generally lack the resources, information, and techniques to predict subsequent abuses with any degree

Elect, Idaho Bd. of Comm'rs (July 17, 1983) (problems coupled with refusal to answer could result in denial).

437. Papke, *supra* note 86, at 19-20.

438. See *supra* pp. 548-49.

439. See M. WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 216-21 (H. Gerth & C. Mills eds. 1946) (defining Kadi justice as informal judgments rendered according to individual decisionmaker's ethical or practical valuations).

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of accuracy. Only a minimal number of applicants are permanently excluded from practice, and the rationale for many of those exclusions is highly questionable.

Disciplinary oversight for non-professional offenses has been equally erratic, but the overall infrequency of sanctions has enshrined a curious double standard. Much activity that prompts delay or denial of aspiring attorneys carries no risk for practitioners. The amount of attention directed at predicting misconduct is difficult to justify when compared with the grossly inadequate responses to demonstrated professional abuses. The bar's continued failure to cope with incompetence, dishonesty, and dilatory tactics by licensed practitioners belies the premises of its certification ceremonies.

This indictment suggests a variety of possible correctives. The most fundamental would be to abandon character inquiries; the bar would cease to monitor the moral conduct of applicants and most non-professional behavior of practitioners, and would concentrate its resources on policing professional abuses. The merits of that approach become clearer upon consideration of less sweeping alternatives, such as more stringent procedural or substantive regulation of character certification by statutory or judicial mandate.⁴⁴⁰

A. *Process Constraints*

One means of addressing certain of the due process difficulties with current certification structures is through procedural renovation. For example, in an effort to minimize inconsistency and uncertainties in bar decisionmaking, states might publish more stringent regulations governing the scope and format of character inquiries, as well as statistical profiles of the number of applications processed, deferred, accepted, and denied. Central examining boards could also be required to issue definitive advance rulings, as well as written decisions in any case of non-certification or reversal of a lower committee determination.⁴⁴¹ Those dispositions, together with judicial rulings, could be compiled in a form that would safeguard the privacy of individual applicants while making substantive determinations available to applicants, law schools, and examiners. To prevent committees from delaying decisions on problem cases in the hope that appli-

440. Although courts have asserted inherent power to determine standards for practice, state legislation has been sustained insofar as it is consistent with judicial objectives. *See* Rhode, *supra* note 93, at 11-12 and sources cited therein.

441. For example, applicants seeking an advance ruling could submit a statement of facts and relevant records to the committee. Assuming those facts to be true, the committee would issue a ruling that would be binding if favorable to the applicant, and subject to reconsideration if unfavorable. *See* N.Y. *Comm. Rep.*, *supra* note 101, at 45. Inconclusive dispositions, such as "probably admitted," *see supra* pp. 572-73, would not be an option.

cants will withdraw from the process, states might prescribe fixed time periods for completing certification inquiries.

Finally, the entire review process could be streamlined to minimize inessential and intrusive formalities. To that end, a committee charged with reviewing New York's procedures recommended elimination of mandatory interviews and personal references. In addition, the committee proposed appointment of an ombudsman to investigate applicant complaints and monitor procedural compliance.⁴⁴²

Such structural adjustments would respond to a number of the constitutional concerns discussed earlier. By rendering the certification process more visible and by mandating clearer articulation of its governing standards, states may somewhat increase the consistency and predictability of decisionmaking. Applicants would have a better sense of the relevant criteria and scope of inquiry, and less effort and expense would be consumed in arid rituals.

The danger, however, is that a more acceptable procedural facade will simply shore up a fundamentally bankrupt structure. The current disciplinary system is replete with process safeguards, which have done little to mitigate intrusive and irrational applications of character criteria regarding nonprofessional offenses. Without attention to the substantive problems in oversight structures, procedural renovations are of limited value.

B. *Substantive Constraints*

A second, to some extent complimentary, strategy for restructuring character inquiries would involve a move from open-textured standards to more precisely delineated rules. The least radical leap might entail formalization along the lines of some state licensing statutes. For example, New York provides that no license shall be denied for lack of good moral character or previous criminal conviction absent a "direct relationship" between the offenses committed and the employment sought, or an "unreasonable risk" to property or to public safety or welfare if the license were granted.⁴⁴³ In making that determination, public agencies must consider a range of factors including the remoteness and seriousness of prior offenses, their relationship to the specific duties entailed by licensure, the rehabilitation of the applicant, and public policies encouraging employment of former offenders.⁴⁴⁴

Such a formulation would have the virtue of focusing inquiry on public

442. *N.Y. Comm. Rep.*, *supra* note 101, at 48.

443. *N.Y. CORRECT. LAW* § 752 (McKinney Supp. 1984).

444. *Id.*

safety and the functional characteristics of employment rather than on more elusive concerns such as the profession's general reputation or the applicant's respect for law. In practice, however, it is doubtful that such standards would ensure less indeterminate decisions, particularly since the criteria prescribed are those now frequently invoked in certification and disciplinary proceedings.

A more plausible means of constraining discretion would be to specify conduct that might—or alternatively must—warrant exclusion. For example, in the certification context, applicants could submit affidavits indicating whether they had committed certain criminal or civil offenses involving violence, dishonesty, or theft.⁴⁴⁵ Individuals with a record of such convictions would submit more detailed personal information; the remaining candidates would be certified absent evidence controverting the affidavits. Alternatively, certain misconduct could operate as a *per se* disqualification for a given period. Applicants guilty of specified offenses or patterns of offenses would be temporarily foreclosed from practice; those who committed no further abuses during the prescribed interval would then automatically be certified.

Analogous, though not necessarily identical, requirements could govern discipline for attorneys' nonprofessional misconduct. Clearly the rationale for monitoring practitioners' personal behavior is somewhat stronger than the justification for screening candidates' conduct. Attorney actions, unlike much applicant misconduct, cannot be discounted as remote in time or the product of youthful indiscretion. Moreover, violations of the law assume a different symbolic dimension when committed by those sworn to uphold it. Perjury by an officer of the court seems equally damning whether committed in a private or representative capacity.

Yet although the boundary between personal and professional misconduct will in some individual instances appear arbitrary, the general distinction remains significant. Abuses in a lawyer-client relationship are more likely to predict future conduct in that capacity than many of the personal offenses for which attorneys have been sanctioned. Of course, problems of erroneous prediction arise in the context of professional as well as nonprofessional abuses. But part of the function of disciplinary sanctions lies in general deterrence; even if it is unclear whether a particular attorney will commit future offenses, the censure stands as a warning to other practitioners. With respect to nonprofessional abuses, that deterrent function is already served by the penal system. Society has ample means for denouncing such misconduct; licensing structures need not be

445. For a comparable proposal, see *N.Y. Comm. Rep.*, *supra* note 101, at 51.

harnessed to replicate the stigmatizing functions of criminal and community sanctions.

Given these considerations, states could confine the bar's disciplinary jurisdiction to certain specified acts that would trigger discretionary or mandatory sanctions. Such offenses either could be limited to activities performed as a lawyer, or could also encompass related conduct that directly implicated the legal system or involved service as a fiduciary or public official.

The relative merits of formalization have been exhaustively canvassed elsewhere and need not be rehearsed at length here. The conventional assumption is that the sharper the lines confining judicial and administrative discretion, the greater the predictability, consistency, and accountability of decisionmaking.⁴⁴⁶ Limiting the conduct that will occasion inquiry may mitigate the intrusive aspect of oversight, while increasing the correspondence between individual judgments and common values.

Yet, in the licensing context, those virtues are not readily realized. Two threshold difficulties are determining who formulates the classifications and on what basis. In the absence of public consensus or empirical foundations, by what criteria should we identify disqualifying offenses? It is easy to posit clear cases, to hypothesize individuals whom almost any decisionmaker would prefer not to certify. The fourth-time embezzler is a logical candidate for exclusion. But such candidates do not comprise an appreciable percentage of the applicant pool. The difficulty arises in formulating rules that will ensure principled resolution of the vast majority of contested cases. Equally problematic is determining which decisionmaking body to entrust with that task. State control over bar membership presents obvious risks; should those charged with maintaining countermajoritarian values be selected by reference to majority sentiment? As experience in other countries makes clear, where the government monitors the profession, the profession has greater difficulty monitoring the government. Yet, as the prior discussion suggests, neither is the bar itself well-situated to police the mores of its membership. Where its own status is so directly implicated, the bar cannot make disinterested judgments about the public's interest in character criteria.

Moreover, there are difficulties with implementing as well as delineating any bright-line disqualifications. The more precise the formulations, the more under- and over-inclusive their application becomes. As Duncan Kennedy has noted, any per se approach not only permits but mandates

446. See, e.g., L. FULLER, *THE MORALITY OF LAW* 33-44 (1964); P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION* 61-62 (1978); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

arbitrariness.⁴⁴⁷ And for purposes of character assessment, such formalization seems almost self-defeating. Concepts of virtue do not readily reduce to mechanical formulae. A single act of misconduct, abstracted from its social context, is a highly imperfect measure of moral fiber. But the more life history the rules take into account, the less functional they become as rules. Enlarging the scope for individualized determinations also enlarges the potential for intrusive and inconsistent discriminations. A formal structure that incorporates concepts such as mitigation and rehabilitation relinquishes the values on which formalization is premised. Yet to exclude such concepts may in some cases simply be to exchange the arbitrariness of individual decisionmakers for the arbitrariness of individual events.

That is not to imply that such an exchange would prove pointless. On balance, the history of character certification suggests that rigid rules are preferable to elastic standards. Given the considerable costs and dubious value of current licensing standards, the virtues of a nondiscretionary, bright-line alternative appear to be substantial. Yet equally significant is the risk that greater substantive as well as procedural constraints will help legitimate a fundamentally illegitimate system. Structural tinkering may mitigate the worst abuses of screening, but cannot redeem its premises. The inherent inadequacies of predictive techniques render any plausible certification system a highly inadequate means of safeguarding the public. Thus, preserving the pretense of character certification may simply buttress the profession's claims to social status, economic monopoly, and regulatory autonomy, while deflecting attention from more meaningful forms of oversight.

C. *The Retreat from Omniscience*

In its latest pronouncement on the subject, the Supreme Court acknowledged that "wise policy," if not constitutional prescription, might dictate reliance on post-admission sanctions rather than preliminary screening as a means of policing the bar.⁴⁴⁸ Particularly in a context where neither state nor professional oversight is an attractive alternative, abandoning the enterprise has much to commend it. In essence, the bar would cease monitoring character for purposes of admitting attorneys or of disciplining non-professional abuses. Such an approach would avoid the indeterminacies of standards, the rigidity of rules, and the pretense that either promises adequate public protection.

That is not to suggest that decertification would come without costs, or

447. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

448. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. at 167.

that the market would prove an ideal regulator. Letting clients determine what character credentials are relevant assumes that consumers can gain access to the relevant information, and that only they are affected by purchasing decisions. Neither condition holds in the market for legal services. Certain externalities, such as the effects on third parties and on the administration of justice, are always present. And information barriers cannot be wholly removed, although they might to some extent be mitigated. For example, central licensing authorities could require attorneys to disclose certain criminal and civil misconduct as well as prior disciplinary sanctions. Such information could be compiled and made available to clients and employers through public and professional agencies, consumer groups, and lawyer directory services.

Of course, that approach is by no means wholly satisfactory. There remains the problem of who decides what conduct warrants disclosure and what criteria govern that decision. It is also likely that some segments of the public would overvalue matters of little probative significance, while the bulk of consumers would remain uninformed. Although such difficulties cannot be discounted, neither should they be exaggerated. Removal of entry barriers is unlikely to alter the composition of the bar significantly. As it stands, certification and disciplinary procedures rarely result in permanent exclusion on character grounds, and it is by no means clear how many or what sorts of applicants are deterred by current standards. Nor is the public now well-informed about the abuses of applicants or licensed attorneys. Moreover, even in the absence of state certification, other institutions would undoubtedly continue to exercise some screening function. Law schools' academic criteria already exclude a large percentage of serious offenders, and their own institutional concerns dictate a certain degree of scrutiny, irrespective of what the bar formally requires. Since public and private employers of attorneys have similar interests, one would not expect to find habitual embezzlers flocking to the profession if the bar abandoned formal certification procedures.

In any case, from the standpoint of public protection, the issue is not how many former felons would become or remain practitioners, absent character inquiries. Rather, the question is whether resources now consumed in predicting professional misconduct would be better expended in detecting, deterring, and redressing it. Given the inherent inadequacies of screening procedures, and the woefully inadequate funding for disciplinary and client compensation systems, such a reorientation of efforts could yield significant improvements.

Much, of course, would depend on where the resources were rechanneled. And, while this is not the occasion for a comprehensive analysis of the disciplinary process, two general points bear emphasis. If the bar is seri-

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ously committed to maximizing public protection, control over the disciplinary process should be vested in less partisan quarters. Professional attention should also center on less fundamental reforms, such as stiffer sanctions, increased client security funds, mandatory arbitration and audit procedures, adjustments in malpractice standards, and expansions in disciplinary agency jurisdiction.⁴⁴⁹

So too, if the profession's regulatory process is to assume meaningful symbolic dimensions, its force should be conserved for acts bearing directly on professional practice. Insofar as designating deviance has any legitimate role in reaffirming professional values, the bar's current designations seem seriously askew. For example, in 1983, the Indiana Supreme Court merely suspended for forty-five days an attorney who habitually neglected cases, deceived his clients, and withheld their funds.⁴⁵⁰ That same year, the court disbarred a lawyer for growing his own marijuana,⁴⁵¹ and presided over a certification system concerned with bounced checks, political commitments, and consensual sexual activity.

Nor is that state an isolated example. As much of the preceding analysis reflects, the bar's moral outrage has been largely exhausted by ceremonial inquiries and occasional oustings of petty transgressors and former felons. Most garden variety professional misconduct—incompetence, harassment, deception, and delay—is rarely reported or sanctioned.⁴⁵² Until those priorities are reversed, the bar can lay no special claim to character as a professional credential. Whatever the profession's interest in defining a moral community, current admission and disciplinary procedures are ill-suited to that end.

To some extent, the evolution of current oversight structures parallels the growth of societies for the suppression of vice. Beginning with "the best intentions," such organizations almost inevitably degenerate, often into "receptacle[s] for . . . tittle-tattle [and] impertinence," and ultimately into bureaucracies; the administrators become tradesmen, and moral sentiments are "swallowed up in the pursuit of a daily occupation . . ."⁴⁵³ So too, as concepts of professional character become bureaucratized, they

449. See *supra* pp. 548–49. Attorney negligence does not fall within the jurisdiction of most bar disciplinary agencies, and the difficulties of proving malpractice have been frequently noted. Marks & Cathcart, *supra* note 251, at 216–17; Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Martyn, *supra* note 250, at 733. For discussion of the gross inadequacy of client security funds, see A.B.A. STANDING COMMISSION ON CLIENT'S SECURITY FUND, REPORT TO THE A.B.A. HOUSE OF DELEGATES (Aug. 1976); Winter, *Client Security Funds: That Sinking Feeling*, B. LEADER, Sept.-Oct. 1981, at 28; Note, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 U. MICH. J.L. REF. 415, 425–29 (1977).

450. *In re Holloway*, 452 N.E.2d 934 (Ind. 1983).

451. *In re Moore*, 453 N.E.2d 971 (Ind. 1983).

452. See *supra* pp. 548–49.

453. S. SMITH, *The Society for the Suppression of Vice*, in SELECTED WRITINGS OF SYDNEY SMITH 287, 292 (W. Auden ed. 1956).

readily become devalued. Administrators' ad hoc denunciations are unlikely to suppress vice or encourage virtue. As currently implemented, the moral fitness requirement both subverts and trivializes the professional ideals it purports to sustain. In seeking to express our aspirations, such rituals succeed only in exposing our pretenses. While hypocrisy is often the bow vice pays to virtue, better forms of tribute may be available.

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APPENDIX I

I. *Information Requested in Bar Applications (1982-83) (N=51)*

A. *Family Background*

Marital status	43%
Prior divorce	33%
Legal records of divorce required	39%
Spouse's name ¹	35%
Wife's maiden name	24%
Spouse's occupation	4%
Residence with spouse	14%
Reason for separate residence	4%
Parents' names ²	57%
Parents' addresses	47%
Parents' occupations ²	31%
Siblings' names	6%
Siblings' occupations	4%
Childrens' names	2%

B. *Citizenship and Residency*

U.S. citizenship	69%
When and where applicant last voted	4%
Applicant's prior residences ³	82%
Birthplace	84%

C. *Educational Background*

Junior high school attended	24%
High school attended	61%
High school awards, honors, or extra-curricular activities	4%
High school discipline	63%
College/Law school awards, honors, or extra-curricular activities	16%
College probation or discipline	86%
Denied admission to any school, college, or law school ⁴	6%

D. *Military Service*

Military service performed	78%
Type of discharge/non-honorable discharge	88%
Military offenses or discipline	51%
Court-martial	37%

E. *Employment and Professional Background*

Employment history ⁵	88%
Legal employment	18%
Self-employment	14%

Account for all activities since age 17 or 18	8%
Future employment (next year or next employer)	6%
Employment dismissals or resignation	49%
Due to unsatisfactory work/misconduct	22%
Due to dishonesty	6%
All dismissals or resignations ⁷	24%
Accused of dishonesty on the job	10%
License requiring character denied or revoked	73%
Denied admission to other state bar	92%
State bar disciplinary actions	75%
Professional disciplinary proceedings	63%
Disciplined or removed from public office	47%
Held a bonded position ⁷	53%
Bond refused, revoked, canceled, or subject to litigation ⁷	65%
Surety ever required to pay on bond	12%

F. *Criminal Proceedings*

Party to criminal action ⁷	24%
Arrested/taken into custody	51%
Charged	49%
Questioned	14%
Accused of a crime ⁹	8%
Subject of investigation	2%
Served with a criminal summons	14%
Requested to appear before any prosecutor or investigative agency	6%
Indicted	14%
Tried	14%
Convicted ⁸	59%
Pled guilty or no contest	29%
Received warning	4%
Charge pending or awaiting trial	10%
Immunity granted or offered	10%
Refused to testify/pled the Fifth Amendment	6%
Testified or involved as a witness in a criminal case	6%
Juvenile offenses specifically included	10%
Moving violations/serious traffic offenses specifically included ¹⁰	8%
Expunged records specifically included	24%
Expunged records specifically excluded	12%

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G. *Non-criminal legal proceedings*

Involved as a party or claimed an interest in any civil proceeding ¹¹	63%
Charged with fraud or misrepresentation ¹²	59%
Charged with dishonorable, dishonest, or improper conduct	12%
Charged with perjury, forgery, or false swearing	8%
Charged with immorality	4%
Charged with embezzlement, conversion, or breach of fiduciary duty ¹³	18%
Charged with extortion	2%
Bankruptcy ⁷	63%
Creditor judgments against applicant, or unsatisfied judgments	69%
Default of court ordered duty	14%
Involvement in guardianship proceedings ⁷	29%
Declared ward of court	35%
Accusations of, or involvement in unauthorized practice of law ⁸	20%
Suits pending against applicant	6%
Any judgments or court orders of continuing effect against applicant	22%
Subject to alimony or child support judgments	6%
Accusations or judgment of legal malpractice	12%
Contempt orders against applicant	7%

H. *Financial Affairs*

List all debts over \$200	4%
List debts past due ¹⁴	27%
List all student loans	4%
Any check dishonored	7%
Principal stockholder of private corporation	2%

I. *Physical, Mental and Emotional Fitness*

Physical ailments	10%
Adjudicated incompetent or insane	76%
Committed to mental institution ¹⁵	43%
Voluntary patient in mental institution ¹⁶	39%
Treatment for, diagnosis of, or suffering from mental illness ¹⁷	27%
Treatment for, diagnosis of, or suffering from emotional disturbance ¹⁷	12%

Any health problem bearing on fitness to practice law ¹⁸	6%
Drug addiction or dependence ¹⁹	67%
Alcohol addiction or dependence ¹⁹	67%
Treatment for drug use ²⁰	69%
Treatment for alcohol use ²⁰	69%
Accusation of drug or alcohol addiction	4%
Adjudicated an alcoholic or addict	2%
Committed to an institution for drug and or alcohol problems	4%
Discharged from employment for drug and or alcohol problems	4%
J. <i>Associations and Beliefs</i>	
Intent to overthrow the government	24%
Loyal to State constitution	24%
Loyal to U.S. government or constitution	25%
List organizations in which member	2%
Membership in group aiming to overthrow government	27%
Member of Communist Party	2%
Membership in any organization terminated	2%
Approval of attorney's oath	10%
K. <i>Materials Requested</i>²⁴	
Authorization and release ²¹	88%
Birth certificate	6%
Fingerprint card	41%
Handwriting sample	16%
Photograph	25%
Physician's certificate	4%
Law student registration form	16%
Certificate of graduation from law school	43%
Certificate of law school dean	29%
With questions concerning moral character	18%
With questions concerning disciplinary action	14%
Attorney references required ²²	31%
Personal references required ²³	73%
Attorney recommendations (between one & four) required	29%
Personal recommendations (between one & five) required	39%
Recommendation form supplied by state	43%
Including general character questions	25%
Including specific character questions	22%

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L. General Information

List all other incidents that might reflect unfavorably on applicant's character	35%
Fifty or one hundred word statement of reasons for practicing law	4%
Attests to reading code of professional responsibility	37%
Willingness to comply with code	22%

Footnotes

1. Missouri seeks such information only from female applicants.
2. Ten percent of all jurisdictions also request the mother's maiden name. West Virginia requires only parents' occupations for past ten years.
3. A quarter of the states demand all residences since age 16 or younger, another quarter demand them for the past 10 years, and a fifth specify 5 or 6 years. The remainder request information ranging from all residences to residences since age 18 or 5 years, whichever is shorter.
4. Four percent restrict inquiry to reasons reflecting on character.
5. States request employment history for varying periods, e.g., the past 5 years (22%); the past 10 years (8%); since age 16 (27%); since age 18 (14%). One state requires listing of all employment.
6. The most common questions are whether the applicant's conduct or any of his employers' conduct has been "called into question" regarding unauthorized practice of law.
7. Hawaii restricts inquiry to the past 10 years.
8. Massachusetts restricts inquiry to felonies within the last 7 years and misdemeanors in the last 5 years.
9. South Carolina includes informal accusations.
10. Colorado restricts inquiry to the past 7 years.
11. California excludes adoption. Hawaii restricts inquiry to the last 10 years. Louisiana asks only about involvement as a defendant. Massachusetts excludes divorce.
12. Six percent restrict inquiry to actions in which the applicant was adjudged liable.
13. Four percent restrict inquiry to actions in which the applicant was adjudged liable.
14. Some states restrict inquiry to debts more than 60 days due; New York asks only about debts over \$300.00.
15. Ten percent restrict inquiry to time periods ranging from 3 to 10 years or since the age of 18.
16. Four percent restrict inquiry to periods ranging from 5 to 10 years or since the age of 18.
17. Mississippi restricts inquiry to the past 5 years.
18. Montana restricts inquiry to the past 5 years.
19. Twelve percent restrict inquiry to periods ranging from 1 to 10 years or since the age of 18.
20. Some states restrict inquiry to varying time periods.
21. A typical form will require the applicant to authorize and request every medical doctor, school

official, or other person and organization to give information pertaining to fitness to the Board of Bar Examiners. The applicant must agree to waive any privilege of confidentiality and to release all individuals from liability in connection with their disclosures.

22. The number varies from 1 law professor to 3 references from each place the applicant has lived.

23. The number varies from 2 to 5 references plus, in some instances, 3 from each place applicant has lived.

24. These percentages may understate the materials requested since not all jurisdictions may have included such requests in the application package sent for use in this study.

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APPENDIX II

CHARACTER AND FITNESS INTERVIEW QUESTIONNAIRE (Hearings)

State _____ District _____

Name of individual respondent _____

Position and address, including phone number _____

Length of time individual has served in that position _____

Date questionnaire completed _____

I. *The Character and Fitness Review Process*

How long is the typical interview/hearing?

What is the range (the longest and shortest) of interviews/hearings?

What would be the normal format?

What are the standard hearing procedures?

(Check applicable procedures)

___ Rules of evidence apply

___ Applicant may be represented by counsel

___ Bar is represented by a prosecutor

 If yes, who performs this function?

___ Formal record is kept

___ Bar presents evidence

___ Other (please describe).

How many committee members would meet with the applicant?

How are decisions made after the interview/hearings?

How many interviews/hearings would a typical case require?

About how long does the process take in the typical case?

What would be the range? (Length of shortest and longest cases).

What information is routinely available for the committee members concerning each applicant?

Are there any questions or general subjects that an interviewer is instructed to cover?

☐ Yes ☐ No

If yes, please describe.

What questions do you normally ask during the interview/hearing?

a) Do you restrict yourself to the issues that triggered the interview/hearing? ☐ Yes ☐ No

If no, please explain.

b) Are there standard questions? ☐ Yes ☐ No

If yes, please describe.

Are there any published policies or guidelines concerning the character and fitness review process?

☐ Yes ☐ No

If yes, please send a copy.

Are there any unpublished or informal guidelines?

☐ Yes ☐ No

If yes, please explain and send copies.

Does the applicant receive any information in advance concerning the content of the interview/hearing?

☐ Yes ☐ No

If yes, please explain.

Have there been changes over the past five years concerning the character review procedures or content?

☐ Yes ☐ No

If yes, please explain.

Do applicants ever refuse to answer particular questions? If so, how frequently?

☐ Never ☐ Occasionally

☐ Virtually Never ☐ Frequently

☐ Rarely

What types of questions trigger refusal?

What are the consequences of such refusal?

Do the applicants know of those consequences in advance of the interview/hearing?

What, if any, action is taken if an applicant's answers are evasive or unconvincing?

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Do law schools ever contact you or your committee for general guidance or for an opinion on a particular case? If so, how frequently?

General Guidelines:

- ☐ Never
- ☐ Virtually Never
- ☐ Rarely
- ☐ Occasionally
- ☐ Frequently

Particular Case:

- ☐ Never
- ☐ Virtually Never
- ☐ Rarely
- ☐ Occasionally
- ☐ Frequently

Please describe the last two or three cases in which you gave an opinion to an applicant. Are they typical? Please explain.

What sort of responses do you make?

- | | |
|-----------------------------------|-------------------------------------|
| <input type="checkbox"/> Formal | <input type="checkbox"/> Committee |
| <input type="checkbox"/> Informal | <input type="checkbox"/> Individual |
| <input type="checkbox"/> Other | <input type="checkbox"/> Other |

Do law school applicants contact you for an opinion on their likely admissibility? If so, how frequently?

- | | |
|--|---------------------------------------|
| <input type="checkbox"/> Never | <input type="checkbox"/> Occasionally |
| <input type="checkbox"/> Virtually Never | <input type="checkbox"/> Frequently |
| <input type="checkbox"/> Rarely | |

Please describe the last two or three cases in which you gave an opinion. Are they typical? Please explain.

What sort of responses do you make?

- | | |
|------------------------------------|-------------------------------------|
| <input type="checkbox"/> Formal | <input type="checkbox"/> Informal |
| <input type="checkbox"/> Committee | <input type="checkbox"/> Individual |
| <input type="checkbox"/> Other | |

II. *Review of Committee Recommendations*

Approximately how many hearings or interviews did your committee conduct?

- ☐ in 1982
- ☐ over the past 5 years.

Approximately how many times did your committee recommend denying certification to an applicant?

- ☐ in 1982
- ☐ over the past 5 years.

What board(s), committee(s) or court(s) would review the committee's recommendations of denial of certification?

How often are your committee's recommendations of denial of certification accepted by this reviewing body?

In 1982, ____% of recommendations were accepted.

Over the past 5 years, ____% of recommendations were accepted.

In 1982, what types of conduct caused the committee to recommend, or seriously consider recommending, denial? What happened in those cases?

Are those cases typical?

What sorts of conduct has the committee generally found the most troubling?

Although obviously every decision turns on a variety of factors, can you indicate how the committee would treat the following conduct and whether such conduct has been presented by any specific cases during your term? If such cases have arisen, was the individual admitted?

Criminal conviction such as assault, theft.

Conviction for drug offense (e.g., marijuana, cocaine).

Draft related offense.

Traffic offenses (driving while intoxicated, parking violation).

Sexual relationships (e.g., homosexuality, cohabitation).

Activist political activity (e.g., membership in a radical political organization).

Unauthorized practice of law.

Academic misconduct (e.g., cheating in college or law school).

Lack of candor on bar application.

Psychiatric treatment.

Financial mismanagement such as history of bounced checks.

Bankruptcy.

Moral Character as Professional Credential

III. *The Character and Fitness Committee*

Who are the members of the committee?

- a) ☐ Number of Lawyers ☐ Number of Laymen
- b) ☐ Single Interviewer ☐ Multiple Interviews
- c) Approximately what percent of interviewers are:
 - ☐ Males ☐ Minorities
 - ☐ Over 35 ☐ Over 55

Nature of Legal Practice:

- ☐ Large Law Firm (20 or more attorneys)
- ☐ Small Law Firm (Less than 20 attorneys)
- ☐ Sole practitioner
- ☐ Other.

How are the members of the committee chosen?

How long do they serve?

How many interviews/hearings do they typically conduct each year?

Please estimate the amount of time you devote annually to the character and fitness committee.

What, if any, training, orientation or materials do the members of the committee receive? Please send copies of all published material.

What, if any, monetary compensation do you receive for your services?

Comments

How and why did you become involved in the character review process?

Did you volunteer or were you asked to serve?

Do you think your reasons for involvement are typical of most interviewers?

What do you see as the main purposes of the character and fitness review process?

How effective do you think it is in accomplishing these objectives?

What, if any, problems do you perceive in the review process?

How do you think the process is viewed by most applicants?